

ASPECTS OF MULTI-PARTY UNJUSTIFIED ENRICHMENT IN SOUTH AFRICAN LAW

A COMPARISON WITH GERMAN LAW

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For my mother, Juliet Lesley Maxwell

University of Cape Town

PREFACE

A few weeks before beginning my legal studies at the University of Cape Town, I received a letter from Professors Danie Visser and Reinhard Zimmermann, welcoming me and other prospective law students to the Law Faculty. I little realised then that their subsequent influence on the course of my legal career and my legal thinking would be immeasurable. It is evidenced in part by the existence – and content – of this thesis. I wish to thank them both for their unfailing support, their helpful advice, and their patience during the very long period it took to produce this work. In addition, I would like to thank Professor Visser for acting as my supervisor and for his always enthusiastic encouragement. I also wish to thank Professor Zimmermann for the kind hospitality he extended to me both in Regensburg and Hamburg, where much of this thesis was written.

Many others contributed towards this project in one way or another. I would not have been able to complete it without the support of my mother, who helped me in too many ways to mention. I would like to thank Professor Zimmermann's assistants for so cheerfully helping me navigate some of the many detours I had to make into the German law of contract, property, insurance, negotiable instruments, and so on, in order to understand the law of enrichment. I am also grateful to one of my colleagues at the University of the Western Cape, Mr Bernard Martin, with whom I was able to discuss many of the more challenging aspects of this thesis, and of thesis-writing in general.

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DECLARATION

I, Catherine Joy Maxwell, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

In this thesis, aspects of the South African law of multi-party enrichment are compared with the equivalent rules of German law. Against the background of a general comparison of the German and South African law of unjustified enrichment, the following sets of factual circumstances are examined in detail: performance of the obligation of another; performance in accordance with an instruction; and performance in response to a cession. Rather than following a conventional comparative approach (viz where a chapter is devoted to each of the legal systems under consideration, and then comparisons are made in a final, analytical chapter), this thesis is structured as follows: each chapter begins with a comparative treatment of the legal context in which such situations arise. Then various factual permutations are treated, taking into account the German and South African approaches to such practical situations and the underlying policy factors that influence the law. On the basis of this critical evaluation, recommendations are made for the development of South African law.

LIST OF ABBREVIATIONS

AcP	Archiv für die civilistische Praxis
AD	Appellate Division Reports
All ER	All England Reports
All SA	All South African Law Reports
Alt	Alternative
ASSAL	Annual Survey of South African Law
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerichtshof (Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshof in Zivilsachen (Decisions of the Federal Court in Civil matters)
CILSA	Comparative and International Law Journal of South Africa
CPD	Cape Provincial Division Reports
EDC	Eastern Districts Court Reports
EDL	Eastern Districts Local Division Reports
GWL	Griqualand West Local Division Reports
HCG	Griqualand West High Court Reports
ICLQ	International and Comparative Law Quarterly
JR	Juristische Rundschau
JuS	Juristische Schulung
JZ	Juristenzeitung
KB	King's Bench Division
LAWSA	Law of South Africa
LG	Landesgericht
LQR	Law Quarterly Review
Marg note	Margin note
Menz	Menzies' Supreme Court Reports
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtprechungsreport Zivilrecht
NLR	Natal Law Reports
NPD	Natal Provincial Division Reports
OLG	Oberlandesgericht
OPD	Orange Free State Provincial Division Reports
QB	Queen's Bench Division
RGZ	Entscheidungen des Reichsgericht in Zivilsachen (Decisions of the Imperial Court in Civil matters)
SA	South African Law Reports
SALJ	South African Law Journal
SC	Cape Supreme Court Reports
Sent	Sentence
SR	High Court of Southern Rhodesia Reports
TH	Witwatersrand High Court Reports
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TPD	Transvaal Provincial Division Reports
TS	Transvaal Supreme Court Reports
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
WLD	Witwatersrand Local Division Reports
ZIP	Zeitschrift für Wirtschaftsrecht

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LIST OF ABBREVIATED TITLES

Full citations are contained in square brackets and in the bibliography

Christie <i>Contract</i>	[R H Christie <i>The Law of Contract in South Africa</i> 4 ed 2001]
De Vos <i>Verrykingsaanspreeklikheid</i>	[Wouter de Vos <i>Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg</i> 3 ed 1987]
De Wet and Van Wyk <i>Kontraktereg</i>	[J C de Wet and A H van Wyk <i>Die Suid-Afrikaanse Kontraktereg & Handelsreg</i> Vol 1 5 ed 1992]
Eiselen and Pienaar <i>Unjustified Enrichment</i>	[Sieg Eiselen and Gerrit Pienaar <i>Unjustified Enrichment: A Casebook</i> 2 ed 1999]
Hutchison (ed) <i>Wille's Principles</i>	[Dale Hutchison (ed) <i>Wille's Principles of South African Law</i> 8 ed 1991]
Jauernig/Schlechtriem	[Peter Schlechtriem in O Jauernig (ed) <i>Bürgerliches Gesetzbuch</i> 10 ed 2000]
Kaser <i>Roman Private Law</i>	[<i>Roman Private Law</i> 3 ed (1980) (transl by R Dannenbring)]
Koppensteiner and Kramer <i>Bereicherung</i>	[Hans-Georg Koppensteiner and Ernst A Kramer <i>Ungerechtfertigte Bereicherung</i> 2 ed 1988]
Kropholler <i>BGB</i>	[Jan Kropholler <i>Studienkommentar BGB</i> 4 ed 2000]
Larenz and Canaris <i>Schuldrecht II/2</i>	[Karl Larenz and Claus-Wilhelm Canaris <i>Lehrbuch des Schuldrechts: Zweiter Band Besonderer Teil</i> vol 2 13 ed 1994]
<i>Münchener Kommentar/Lieb</i>	[Manfred Lieb in <i>Münchener Kommentar zum Bürgerlichen Gesetzbuch</i> 3 ed 1997]
Loewenheim <i>Bereicherungsrecht</i>	[Ulrich Loewenheim <i>Bereicherungsrecht</i> 2 ed 1997]
Lubbe and Murray <i>Contract</i>	[G F Lubbe and C M Murray <i>Farlam and Hathaway Contract: Cases, Materials and Commentary</i> 3 ed 1988]
Malan and Pretorius <i>Bills of Exchange</i>	[F R Malan, J T Pretorius, assisted by S F du Toit <i>Malan on Bills of Exchange, Cheques and Promissory Notes</i> 4 ed 2002]
Medicus <i>Bürgerliches Recht</i>	[Dieter Medicus <i>Bürgerliches Recht</i> 19 ed 2002]
Medicus <i>Schuldrecht I</i>	[Dieter Medicus <i>Schuldrecht I: Allgemeiner Teil</i> 15 ed 2004]
Medicus <i>Schuldrecht II</i>	[Dieter Medicus <i>Schuldrecht II: Besonderer Teil</i> 12 ed 2004]
Reuter and Martinek <i>Bereicherung</i>	[Dieter Reuter and Michael Martinek <i>Ungerechtfertigte Bereicherung</i> 1983]
Palandt	[Peter Bassenge, Uwe Diederichsen, Wolfgang Edenhofer, Helmut Heinrichs, Andreas Heldrich, Hans Putzo, Hartwig Sprau and Heinz Thomas (eds) <i>Palandt: Bürgerliches Gesetzbuch</i> 57 ed 1998 (various contributors)]
Scott <i>Cession</i>	[S J Scott <i>The Law of Cession</i> 1980]

- Van der Merwe et al *Contract* [Schalk van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract: General Principles* 2 ed 2003]
- Van Zyl *Negotiorum Gestio* [D H van Zyl *Negotiorum Gestio in South African Law* 1985]
- Wessels *Contract* [Sir J W Wessels *The Law of Contract in South Africa* 2 ed 1951 (edited by A A Roberts)]
- Wieling *Bereicherungsrecht* [Hans Josef Wieling *Bereicherungsrecht* 2 ed 1999]
- Zimmermann *Law of Obligations* [Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* 1990]

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CHAPTER ONE

INTRODUCTION AND BASIC CONCEPTS

Anyone embarking on an exploration of the South African law of enrichment might be forgiven for feeling 'lost in a maze of sluggish and devious waters'.¹ The whole area is bedevilled by uncertainty, confusion and unknown dangers, which deter potential plaintiffs from bringing enrichment claims to court. The consequent paucity of new cases in turn means that there are few opportunities for judges to develop the law of unjustified enrichment into a coherent and workable branch of our law which is suited to modern conditions, and to bring about much-needed certainty.

This rather primitive area of our legal system looks strange even to South African lawyers, who are used to tripping over the old authorities from time to time. Here one finds all sorts of strange old relics such as the Roman *condictiones*,² patched up with *ad hoc* extensions, with which the courts attempt to hobble through the modern commercial world. Side by side with these Roman survivors one finds a set of general principles that were distilled from the case law by De Vos nearly half a century ago,³ but which have not proved to be the catalyst for development⁴ that one might have hoped,

¹ From 'Evangeline' by H W Longfellow.

² See D P Visser 'The role of judicial policy in setting the limits of a general enrichment action' in Ellison Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 342 at 348: 'In South Africa the Roman *condictiones* still rule us, and not even from their graves, for they have never been properly interred.'

³ See review by C P Joubert (1959) 76 *SALJ* 471 and *Nortje en 'n Ander v Pool* NO 1966 (3) SA 96 (A) at 114C.

⁴ See Reinhard Zimmermann 'A road through the enrichment-forest? Experiences with a general enrichment action' (1985) 18 *CILSA* 1 at 1ff and 19 regarding the law-generating function of such general principles in, for example, German and American law.

and which have until recently been given scant judicial recognition.⁵ On the contrary, they seem to have added to the general uncertainty because nobody knows whether the judge in a particular case will choose to confine himself to the tried and tested specific actions,⁶ or to go to the other extreme and apply the general principles, deciding that, finally, the 'time is right' for the recognition of general liability for unjustified enrichment.⁷ Even now that the Supreme Court of Appeal seems more ready than ever to take that step, we must still wait for what it deems to be an appropriate opportunity to do so.⁸ Within the context of the specific actions there is also uncertainty: whether or not a judge will allow another *ad hoc* extension seems rather unpredictable;⁹ the scope of the action would presumably only be extended where the circumstances made it fair to do so; and it thus amounts to merely a question of equity. Ironically, therefore, the fear of uncertainty and indeterminate liability¹⁰ which led to the court's rejection of a general basis for enrichment liability nearly forty years ago seems to have led to a situation even more fraught with uncertainty, and to liability which is indeed often

⁵ The newer approach is reflected in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), where the court expressed some confidence in the general principles. While the courts have generally continued to apply the specific remedies, many academics who write about unjustified enrichment tend to write about the general principles rather than the old remedies. So, instead of working *in tandem*, the two branches of the profession seem, to a certain extent, to be following separate paths. (An exception is Mr Justice D H van Zyl – see, for example, 'The general enrichment action is alive and well' in D P Visser (ed consultant), T W Bennett, D J Devine, D B Hutchison, I Leeman, C M Murray and D van Zyl Smit (eds) *Unjustified Enrichment: Essays in Honour of Wouter de Vos* 1992 (First published – and subsequently referred to – as *Acta Juridica* 1992) 115 and *ABSA Bank Ltd T/A Bankfin v C B Stander u/a CAW Paneelkloppers* 1998 (1) SA 939 (C)). Cf Reinhard Zimmermann 'Savigny's legacy: legal history, comparative law, and the emergence of a European legal science' (1996) 112 *LQR* 576 at 584: 'A legal practice informed and sustained by legal scholarship, and an approach to legal scholarship that is always mindful of the fact that, ultimately, law serves an eminently practical function: that is what Savigny was aiming for.'

⁶ Cf, e.g., *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A).

⁷ See, for example, *Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T).

⁸ See *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 489A.

⁹ Cf Zimmermann *Law of Obligations* 887n336: '...Nortje v Pool ... provides the helpful comment that they are admissible "[onder] bepaalde omstandighede". Also see the De Vos *Verrykingsaanspreeklikheid* 327-8.

¹⁰ *Nortje en 'n Ander v Pool NO supra* at 139-140. See Zimmermann (1985) 18 *CILSA* 1 at 2: 'The underlying policy consideration was that such [a general enrichment] action would open the floodgates for judicial intervention whenever the distribution of property does not seem to be in accordance with equity.' Similarly, D P Visser 'Searches for silver bullets: enrichment in three-party situations' in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 526; *idem* (n 2) 350. Cf similar fears expressed in the context of delictual liability for negligent misstatements causing pure economic loss: see M M Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) 104 *SALJ* 52 at 58.

indeterminate.

Multi-party enrichment: the problem

Some areas of the South African law of enrichment remain almost completely uncharted. One area of difficulty and uncertainty which has hitherto received very little attention is that of 'multi-party enrichment'.¹¹ Casting the net widely, this may be taken to refer to situations where three or more parties¹² are linked to the fact of enrichment by virtue of connecting legal acts¹³ or by certain other legal facts.¹⁴ This term is to be preferred to 'three-party enrichment'¹⁵ because more than three parties may be drawn into the enrichment relationship.¹⁶ For the same reason, and because identifying someone as a 'third party' is often just a matter of perspective,¹⁷ the term 'third-party enrichment' should also be avoided.¹⁸ 'Three-cornered enrichment' (or 'triangular enrichment')¹⁹

¹¹ Cf the German '*Mehrpersenverhältnisse*'. The expression was used by Schutz JA in *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 493f.

¹² It is not intended to include cases of bilateral enrichment, in which only two parties are involved.

¹³ For instance, a payment or other transfer, theft, the acquisition of possession, or a contract. Examples might be: A owes B a debt in terms of a contract. C pays A's debt to B. Here the parties are linked by the contract A-B and by the payment C-B. Or A purports to conclude a contract of sale with B and B likewise with C and the object of the sales is transferred from A to B to C. While both contracts are void, both transfers are valid. Here the parties are linked, not so much by their 'contracts', as they obviously do not exist, but by the transfers A-B and B-C. A party could be linked with each of the others, or with only one of them.

¹⁴ For example, a duty which derives *ex lege* e.g. a duty of a parent to maintain a child: A owes a duty of maintenance to B. C buys necessities and/or other things for B and then wants to claim the cost thereof from A. See Daniel Visser 'Das Recht der ungerechtfertigten Bereicherung' in Robert Feenstra and Reinhard Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 374 at 379.

¹⁵ See, e.g., Visser (n 10).

¹⁶ For example, in the so-called 'performance chains', there could be more than two successive transfers i.e. A transfers something to B, who transfers the same object to C, who in turn transfers it to D, and so on.

¹⁷ See J P Dawson 'Indirect Enrichment' in Ernst von Caemmerer, Sonia Mentschikoff and Konrad Zweigert (eds) *Ius Privatum Gentium: Festschrift für Max Rheinstein* vol 2 (1969) 789 at 795 (regarding banking transactions): 'How such transactions should be analyzed depended in part on one's angle of vision. For the person who complied with such a request the payment was made to a third person. For the person who gave the request (the debtor or other obligor) and also for the receiver the payment or transfer was made through a third person.'

¹⁸ An additional reason for rejecting this term is that it was used by A M Honoré to refer to two extremely narrowly-defined situations: where 'A transfers money or property to B, which B applies so as to benefit C' and where 'A, at the instance of B, performs a service for C': 'Third party enrichment' 1960 *Acta Juridica* 236. Cf D H van Zyl who uses 'indirect' and 'third party enrichment' interchangeably: *ABSA Bank Ltd t/a Bankfin v C B Stander t/a CAW Paneelkloppers supra* at 948.

¹⁹ See, for example, Hutchison (ed) *Wille's Principles* 634; Visser (n 2) at 358; F R Malan and J T Pretorius 'Enrichment in triangular situations, interest and the in duplum rule, and personal

has a specific, limited meaning in terms of German law²⁰ and should therefore also be rejected as a general ‘umbrella-term’. Similarly, ‘indirect enrichment’ is unsatisfactory as a general term; it has been used in South Africa sometimes to refer to two specific categories of cases, and sometimes to cover a broader range of circumstances.²¹

Even though it is within this area that many of the most fundamental problems besetting South African enrichment law come to the fore,²² apart from a few articles and essays dealing with limited aspects of the topic,²³ several case notes²⁴ and short discussions in a couple of textbooks,²⁵ the subject has not been tackled by South African academics. To read the leading textbook, De Vos’s seminal work, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*, for example, one would not think that multi-party enrichment is regarded as the ‘most notoriously difficult of all enrichment constellations’;²⁶ he either deftly sweeps it under the carpet by reference to the *paritas creditorum* rule,²⁷ or throws it out the back door altogether by defining it out of existence: where an enrichment is ‘passed on’ from the party who was originally enriched, he says, it no longer falls within the scope of the term ‘enrichment’.²⁸

-
- liability and company names’ (1996) 8 *South African Mercantile Law Journal* 399.
- ²⁰ See, for example, Medicus *Schuldrecht II* marg notes 727 ff; Loewenheim *Bereicherungsrecht* 30 ff.
- ²¹ See, e.g., Van Zyl *Negotiorum Gestio* at 113 ff; Visser (n 2) at 358; Daniel Visser and Saul Miller ‘Between principle and policy: indirect enrichment in subcontractor and ‘garage repair’ cases’ (2000) 117 *SALJ* 594; *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 492A.
- ²² For example, problems of definition and lack of conceptual clarity (e.g. what exactly is meant by ‘enrichment’ in our law?) and problems of policy (e.g. how far down the ‘causal chain’ should one allow a plaintiff to sue?).
- ²³ See Honoré 1960 *Acta Juridica* 236. Recently D P Visser has made contributions in this area: see references in notes 15 and 21 above. Also see J C Sonnekus ‘Ongeregverdigde verryking en ongeregverdigde verarming vir kondikering in drieparty-verhoudings’ 1996 *TSAR* 1.
- ²⁴ See, for example, J E Scholtens ‘Enrichment at whose expense?’ (1968) 85 *SALJ* 369; W de Vos ‘Enrichment at whose expense? A reply’ (1969) 86 *SALJ* 227.
- ²⁵ See, for example, De Vos *Verrykingsaanspreeklikheid*, especially at 339 ff; Van Zyl *Negotiorum Gestio* at 113 ff; and Eiselen and Pienaar *Unjustified Enrichment* 77-8, 210-15, 218-9.
- ²⁶ Zimmermann *Law of Obligations* 874. Also see R Zimmermann and J du Plessis ‘Basic features of the German law of unjustified enrichment’ [1994] *Restitution Law Review* 14 at 31 n32.
- ²⁷ See, e.g., p 342.
- ²⁸ See, e.g., pp 89 ff and 340. See review of the first edition by C P Joubert (1959) 76 *SALJ* 471 where, interestingly, the only specific topic singled out for criticism is De Vos’s treatment of ‘die russenpersoon of russenvermoë se rol by verrykingsaanspreeklikheid’ which Joubert describes as ‘hoog kontensieus en aanvegbaar’ (at 475).

The relatively few²⁹ cases which deal with the question have been characterised by confusion and a lack of consistency. For example, one can think of the line of cases which held that, in circumstances where the main contractor had disappeared or become insolvent, subcontractor who improved someone's property would have an enrichment lien yet he would not be allowed to bring an enrichment action against the owner of the property on which he had worked.³⁰ Or the cases dealing with the situation where, contrary to a countermand by its client, a bank honours a cheque and then tries to recover the payment from the payee with an enrichment action. Before the Appellate Division finally settled the matter in *B & H Engineering v First National Bank of SA Ltd*,³¹ there were three decisions emanating from provincial divisions of the Supreme Court: one from the Cape, disallowing such an action,³² and two from the Transvaal, allowing the bank a claim based on enrichment.³³

The kind of difficulties – and resultant confusion – encountered in the area of multi-party enrichment can be illustrated by the old case of *Turkstra v Massyn*.³⁴ Massyn purchased a piece of land from a Mr Sofer for £1 485. He was given an extension of time to pay the purchase price, on condition that he paid interest and furnished the seller with a building society guarantee. He did not furnish the seller with the guarantee. Turkstra then undertook to pay the purchase price to the seller, in order to save Massyn from 'serious financial loss', as he had already almost completed building a house on the property and stood to lose it if he did not receive transfer of the property. This loss would also have affected Turkstra, who was one of Massyn's creditors (as cessionary of a claim previously held by Northern Construction Works against him). In

²⁹ See, for example, the comment of Preiss J in *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA 41 (T) at 44C: 'I would have thought that the issues in the stated case would have been dealt with in numerous reported decisions. To my surprise I have ascertained ... that there are only two cases in which this specific issue has arisen for decision.' There was, incidentally, an 81-year interval between the two cases mentioned.

³⁰ Although there have been more recent developments which have attempted to remedy the situation; for example, *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another* 1996 (4) SA 19 (A), which did away with the long-standing illogical distinction between the availability of enrichment actions and enrichment liens in such cases. 1995 (2) SA 279 (A).

³¹ *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C).

³² *Natal Bank Ltd v Roorda* 1903 TH 298; *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA 41 (T).

³³ 1959 (1) SA 40 (T).

terms of Turkstra's undertaking to pay Sofer, Massyn was to remain liable in terms of the contract of sale. Turkstra gave Sofer a guarantee by the Netherlands Bank for the payment of the amount owed by Massyn. Turkstra then paid Sofer by means of a bank draft drawn on the Netherlands Bank and the land was transferred to Massyn.

Turkstra then sued Massyn, basing his claim on four alternative arguments: first, he argued that he had acted as the defendant's surety and thus 'was *ipso facto* subrogated to all the rights which the creditor had against the defendant';³⁵ secondly, in the absence of a suretyship agreement, that he had acted as *negotiorum gestor* vis-à-vis the defendant;³⁶ thirdly, that, by receiving transfer of the land, the defendant had been enriched at his expense;³⁷ and lastly, that he had acted as the defendant's agent.³⁸

The judge was apparently perplexed by the declaration and particulars, which he characterised as a 'hopeless jumble'. He held that the section of the declaration dealing with the argument based on suretyship was vague and embarrassing.³⁹ He held that the claim based on *negotiorum gestio* was 'bad in law' because the plaintiff had not alleged that the defendant was absent.⁴⁰ The claim based on agency met with the same fate: he held that the plaintiff had not alleged that he had 'advised the defendant that he had undertaken to pay as his agent' and that '[i]f this claim is not bad in law it seems to me at least to be vague and embarrassing'.⁴¹ His most scornful dismissal, however, relates to the claim based on enrichment: 'it is quite impossible to understand this part of the declaration and the defendant is obviously embarrassed by the vague and embarrassing nature of it'.⁴²

The fundamental problem in the area of multi-party enrichment, as in the whole of the South African law of enrichment, is that legal science seems to have passed it

³⁵ 42A. Also see 43E and H of the judgment.

³⁶ 43E-F.

³⁷ 43F-G.

³⁸ At 43G.

³⁹ At 45H.

⁴⁰ At 47F.

⁴¹ At 47H.

⁴² At 45D.

by.⁴³ It is in this respect unlike other areas of our law, which were once 'rather less than transparent, [but which] were transformed into systematized, coherent systems - one thinks immediately of the areas of contract, delict and criminal law, where the theories of J C de Wet, W A Joubert, N J J van der Merwe and others were transformed into judgments by judges such as Lucas Steyn and Frans Rumpff.'⁴⁴ Nobody could, by any stretch of the imagination, think of the South African law of enrichment as a 'systematized, coherent system'. Even calling it 'the law of enrichment' is a something of a misnomer, as our collection of old remedies seems almost to be 'tied [b]y a chance bond together.'⁴⁵

Specific enrichment remedies in South African law

1 The *condictiones*

(a) *Condictio indebiti*⁴⁶

The requirements for the *condictio indebiti* are that there must have been a *datio* (a transfer of money or other property)⁴⁷ in the absence of a legal or natural obligation⁴⁸

⁴³ See Zimmermann (1996) 112 *LQR* 576 at 585: 'European legal science, in turn, is based on the belief that the legal material does not constitute an indigestible and arbitrary mass of individual rules and cases, but can be reduced to a rational and organised system. It aims at presenting law as a logically consistent whole. And it attempts to demonstrate how individual rules and the decisions of individual cases can be derived from general propositions, and how they can be understood and related to each other.' Also see Patrick O'Brien 'A generally applicable *condictio sine causa* for South African law' 2000 *TSAR* 752 at 753. The most significant attempt to set the South African law of enrichment on a more scientific footing was that of De Vos: see p 13 below.

⁴⁴ D P Visser 'Placing the civilian influence in Scotland' in D L Carey Miller and R Zimmermann (eds) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 239 at 251. Also see O'Brien 2000 *TSAR* 752 at 753.

⁴⁵ From 'I am a Parcel of Vain Strivings Tied' by Henry David Thoreau.

⁴⁶ See De Vos *Verrykingsaanspreeklikheid* 23-9, 69-71, 171-209; Eiselen and Pienaar *Unjustified Enrichment* 106 ff; Hutchison (ed) *Wille's Principles* 636-8; J G Lotz 'Enrichment' *LAWSA* vol 9 (revised by A de W Horak), First reissue (1996) paras 78-81. This is the most common enrichment remedy and numerous cases could be cited as examples. Important cases include *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) and *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A).

⁴⁷ There are exceptions to this rule e.g. the *condictio indebiti* will lie where there was a transfer of possession rather than ownership, or where the thing transferred was *res incorporalis*: see Lotz (46) para 79. Thus far, our courts have not been prepared to accept that any of the *condictiones* would be available where the enrichment took place by way of a *factum*. For criticism, see Eiselen and Pienaar *Unjustified Enrichment* 108.

requiring such transfer. In addition, the plaintiff must show that, as a result of an excusable error,⁴⁹ he made the transfer in the belief that it was due; or that he made the transfer under duress,⁵⁰ or that he had limited capacity to act when he made the transfer. The *condictio* will lie for the recovery of the thing which was transferred, or an equivalent amount of *res fungibiles*, or, where the recipient has parted with possession of what he received, its surrogate or value to the extent that the recipient remains enriched.⁵¹ In addition, the plaintiff will be entitled to the fruits⁵² and accessions.

(b) ***Condictio ob turpem vel iniustam causam***⁵³

In order to succeed with a *condictio ob turpem vel iniustam causam*, one must again prove that there was a *datio* but this time that it was made in terms of an agreement that was void for illegality. In terms of the *par delictum* rule, the claim is unavailable to anyone who was himself *in delicto* except where the demands of public policy and justice dictate otherwise.⁵⁴ The measure of liability is the same as that under the *condictio indebiti*.

(c) ***Condictio causa data causa non secuta***⁵⁵

The first requirement for a *condictio causa data causa non secuta* is again a *datio* but it must have been made on the basis of an assumption relating to a future event which did not materialise,⁵⁶ or subject to a modal clause which was not complied with or was frustrated. The measure of liability is again the same as that for the *condictio indebiti*.

⁴⁸ Except where the natural obligation arose from the unassisted contract of a minor.

⁴⁹ Whether of fact or law. Regarding the nature of the error, see *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another supra* at 224; *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A); D P Visser 'Die grondslag van die *condictio indebiti*' (1988) 51 *THRHR* 492; *idem Die Rol van Dwaling by die Condictio Indebiti* (unpublished thesis, 1985).

⁵⁰ Provided that he can show that he protested or reserved his rights at the time when he made the transfer.

⁵¹ De Vos *Verrykingsaanspreeklikheid* 364 ff.

⁵² The duty to restore the fruits of an enrichment denotes fruits less the cost of producing them. In the law of enrichment, interest on money is not regarded as a fruit: see Lotz (n 46) para 86n1.

⁵³ See De Vos *Verrykingsaanspreeklikheid* 20-23, 66-8, 160-7; Eiselen and Pienaar *Unjustified Enrichment* 89 ff; Hutchison (ed) *Wille's Principles* 636; Lotz (n 46) paras 82-4.

⁵⁴ *Jajbhay v Cassim* 1939 AD 537 and *Visser v Rousseau* 1990 (1) SA 139 (A).

⁵⁵ See De Vos *Verrykingsaanspreeklikheid* 10-20, 62-6, 154-60; Eiselen and Pienaar *Unjustified Enrichment* 157 ff; Hutchison (ed) *Wille's Principles* 635; Lotz (n 46) paras 85-6.

⁵⁶ Which is surely a 'condition', rather than an 'assumption' or 'supposition': see O'Brien 2000 *TSAR* 752 at 754 and the sources cited there.

(d) *Condictio sine causa specialis*⁵⁷

The *condictio sine causa specialis*⁵⁸ is available in several sets of circumstances. First of all, it will lie against someone who has received possession of the property of another and who has subsequently *bona fide* disposed of or consumed the property. Secondly, it will lie against someone who has received money *ex causa lucrativa*⁵⁹ or on the basis of a *negotium*,⁶⁰ who has subsequently *bona fide* disposed of or consumed the money.⁶¹ Thirdly, this *condictio* (in this context sometimes also called the *condictio ob causam finitam*) is used to claim money or other property transferred to someone in terms of a *causa* which later falls away (e g where the transfer took place in terms of a reciprocal contract and supervening objective impossibility of performance extinguishes the other obligation).⁶² Finally, the *condictio sine causa specialis* can apparently be used to reclaim money or other property transferred to another *sine causa*, in circumstances where none of the other *conditiones* would be applicable.⁶³ While Roman law generally required the existence of a *negotium*⁶⁴ – an antecedent legal relation or transaction between the parties⁶⁵ – for the *condictio sine causa specialis*, more recent

⁵⁷ In general, see De Vos *Verrykingsaanspreeklikheid* 29-36, 71-83, 209-13; Eiselen and Pienaar *Unjustified Enrichment* 170 ff; Hutchison (ed) *Wille's Principles* 638-9; Lotz (n 46) paras 87-9; *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D); *First National Bank of Southern Africa Ltd v East Coast Design CC and Others* 2000 (4) SA 137 (D); *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA).

⁵⁸ Which goes by this name in order to distinguish it from the *condictio sine causa generalis*, which will be granted in circumstances where any of the above *conditiones* would be available.

⁵⁹ It has been argued that this action should also lie where property other than money has been received *ex causa lucrativa*: see De Vos *Verrykingsaanspreeklikheid* 211-12.

⁶⁰ See Hutchison (ed) *Wille's Principles* 638. Regarding the question of a *negotium* in the context of payment by cheque see Chapter Three below.

⁶¹ See, e g, *First National Bank of Southern Africa Ltd v East Coast Design CC and Other supra*; *ABSA Bank Ltd v Standard Bank of SA Ltd supra*.

⁶² The *condictio* is excluded where a contractual remedy would be available e g where there was cancellation of a contract in terms of which a transfer took place: see, e g, Hutchison (ed) *Wille's Principles* 638; De Vos *Verrykingsaanspreeklikheid* 158-9.

⁶³ Lotz (n 46) para 73; Zimmermann *Law of Obligations* 871; Grotius 3.30.18; D P Visser 'Unjustified enrichment' *ASSAL* 273 at 276.

⁶⁴ See De Vos *Verrykingsaanspreeklikheid* 34-5, 54 and 84. De Vos says that there had to be a 'negotium which went hand in hand with the transfer of ownership or possession' and interprets this as meaning that ownership or possession had to be directly transferred by the owner or his agent to the defendant: see, e g, *op cit* at 77.

⁶⁵ *Gonws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T) at 573F; Eiselen and Pienaar *Unjustified Enrichment* at 76, quoting Lee *Introduction to Roman Law* at 347-8. Eiselen and Pienaar are critical of this; they say that it had already fallen away in Roman-Dutch law 'and it should not be resurrected in South African enrichment law. The causality and enrichment requirements provide

writers suggest that this is not required in modern South African law.⁶⁶ This remedy entitles the plaintiff to recover the property itself together with its fruits and accessions, if the defendant received ownership and still has possession of the property. If the defendant only received possession of the property, the plaintiff may claim its value. He may also recover the value of the property if the defendant received ownership but is no longer in possession of the property.⁶⁷

2 Extended *actio negotiorum gestorum*⁶⁸

This remedy will be discussed in detail in the next chapter. At this stage, it should suffice to say that an enrichment remedy is afforded to anyone who administers the affairs of another in the *bona fide* belief that he is administering his own affairs;⁶⁹ or who administers another's affairs for his own benefit, knowing that the affairs are those of another;⁷⁰ or who administers the affairs of another despite his protest;⁷¹ or who administers the affairs of a minor.⁷²

3 The possessor's action for improvements⁷³

A *bona fide* possessor⁷⁴ who maintains or improves the property of another without the

adequate limitations to prevent unwarranted enrichment liability.' In the next paragraph, however, they say that the causality requirement 'presents considerable difficulties in cases of indirect enrichment, that is where there is no *negotium* or antecedent legal relationship between the parties.' (They use the term 'indirect enrichment' in this context to refer to the so-called 'sub-contractor situations'.)

⁶⁶ See e.g. De Vos *Verrykingsaanspreeklikheid* 75-7, 84-5, 106, 111 (who says that the requirement had already been abandoned in Roman-Dutch law); Eiselen and Pienaar *Unjustified Enrichment* 76-8, 218-19.

⁶⁷ See Lotz (n 46) para 89.

⁶⁸ In general, see Van Zyl *Negotiorum Gestio*; Niall R Whitty and Deon van Zyl 'Unauthorized management of affairs' in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 366 ff.

⁶⁹ The *bona fide* gestor: see Van Zyl *Negotiorum Gestio* 100 ff and Chapter Two below.

⁷⁰ The *mala fide* gestor: see Van Zyl *Negotiorum Gestio* 90 ff and Chapter Two below.

⁷¹ The situation of a protesting *dominus*: see Van Zyl *Negotiorum Gestio* 105 ff and Chapter Two below.

⁷² Or someone else with limited capacity to act: see Van Zyl *Negotiorum Gestio* 87 ff and Chapter Two below.

⁷³ See, in general, De Vos *Verrykingsaanspreeklikheid* 48-59, 96-110, 224 ff; Eiselen and Pienaar *Unjustified Enrichment* 241 ff; Hutchison (ed) *Wille's Principles* 639-42; Lotz (n 46) paras 95 ff; Nortje en 'n Ander v Pool NO *supra*; Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 (3) SA 798 (A); Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Investments (Pty) Ltd and Another 1996 (4) SA 19 (A); Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 (1) SA 295 (W).

owner's consent may sue the owner for enrichment. The owner will only be liable for expenditure that is necessary and useful, and therefore not luxurious. The possessor may sue for all necessary expenses, as the owner has been enriched by not having to pay these sums for the preservation of his property. Where the expenses are merely useful,⁷⁵ on the other hand, the claim will lie for the amount by which the value of the property has been increased⁷⁶ or the amount of the expenditure, whichever is the lesser. Regarding useful expenses, the court may allow the owner to waive his right to the improvement and to allow the possessor to remove it, or it may allow the owner to keep the improvement and to pay the value which it would have upon separation. Any right of action will be reinforced by a right of retention until the claim is satisfied.⁷⁷

The legal position of a lawful occupier⁷⁸ is similar to that of a *bona fide* possessor, except that an amount may be subtracted from his claim in respect of his use of the property. *Bona fide* occupiers (i.e. those who believe themselves to be lawful occupiers) are treated in exactly the same way as lawful occupiers. *Mala fide* possessors⁷⁹ and occupiers⁸⁰ are probably also treated like *bona fide* possessors, except that thieves (i.e. *mala fide* possessors of movable property) cannot sue for enrichment.

4 The statutory enrichment action that arises in the context of an informal contract for the alienation of land

A party who performs in terms of an agreement for the alienation of land, notwithstanding the fact that it does not comply with the formal requirements imposed

⁷⁴ I.e. a possessor who believes that he is the owner of the property in question: see De Vos *Verrykingsaanspreeklikheid* 245-7 and Hutchison (ed) *Wille's Principles* 640n65 for this definition and those of occupiers and *mala fide* possessors.

⁷⁵ The majority of writers agree that expenses are useful where they enhance the market value of the property and are generally regarded as useful according to the social and economic values of the community: see, e.g., Lotz (n 46) para 97n2.

⁷⁶ Provided that the improvements are tangible: see *Nortje en 'n Ander v Pool NO supra*; Hutchison (ed) *Wille's Principles* 640n68.

⁷⁷ See, e.g., Hutchison (ed) *Wille's Principles* 641.

⁷⁸ I.e. those who do not believe that they are owners but who have a right to occupy the property. This does not include fiduciaries, usufructuaries and lessees.

⁷⁹ I.e. those who know that they are not owners but act as if they are.

⁸⁰ I.e. those who know that they are not lawful occupiers but act as if they are.

by the Alienation of Land Act,⁸¹ is entitled to recover his performance.⁸² If the performing party was the 'alienator' (e.g. the seller), he is entitled to 'reasonable compensation for the occupation, use or enjoyment' of the land and for any damage inflicted on the property by the other party. If the performing party was the 'alienee' (e.g. the purchaser), he may claim interest on any sum he paid for the property, for the period between payment and recovery. He is also entitled to 'reasonable compensation' for any necessary expenses incurred in maintaining or improving the property, and for any improvements (made with the consent of the alienator) that increase the market value of the land.⁸³

5 Claim for value of an inadequate performance

A party might make such a defective performance in terms of a reciprocal contract that it entitles the other party to cancel the contract. If the cancelling party cannot return the defective performance, as required in terms of the law of contract,⁸⁴ the breaching party may sue him for enrichment.⁸⁵ The claim will lie for the amount by which the cancelling party has been enriched by the other party's inadequate performance.⁸⁶

6 Claim against a minor

Persons who have limited capacity to act (such as minors) are not liable in terms of an agreement which they conclude without the assistance of a parent or legal guardian. The other party⁸⁷ to such a contract may, however, bring an enrichment claim to reclaim his

⁸¹ Act 68 of 1981. These formalities, if not complied with, render the contract at least unenforceable (s 2(1)) if not void (s 24(1)(c)).

⁸² Whether it was full or partial.

⁸³ For further details, see Hutchison (ed) *Wille's Principles* 643-4.

⁸⁴ In accordance with *restitutio in integrum*.

⁸⁵ See, generally, Hutchison (ed) *Wille's Principles* 639; Eiselen and Pienaar *Unjustified Enrichment* 373 ff; Lotz (n 46) paras 98-101.

⁸⁶ The background to this is that inadequate performance or non-performance by a party to a reciprocal contract entitles the other party to withhold his own performance. This, the *exceptio non adimpleti contractus*, is aimed at compelling the first party to make full and proper performance. In such circumstances, however, the court has the discretion to allow the malperforming party to sue the (withholding) party for a reduced counter-performance. This claim was previously known as a claim *quantum meruit*, and it was previously thought to be an enrichment remedy. It is now clear that this action arises from the law of contract, and not the law of enrichment: see *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A); *Thompson v Scholtz* 1999 (1) SA 232 (SCA).

⁸⁷ Provided that he has full capacity.

own performance in terms of the contract, or the amount by which the minor is enriched by the performance.⁸⁸

A general basis for enrichment liability in South Africa

The most notable attempt to analyse this legal 'patchwork'⁸⁹ and to reformulate the law of enrichment on a more scientific basis⁹⁰ was the thesis of Wouter de Vos, which was first published in 1957. After describing the historical development of the common-law remedies, he argued that, while no general action existed in Roman-Dutch law,⁹¹ such a general, subsidiary action had come into being via the South African case law. He then outlined the general requirements of such an action: enrichment⁹² at the expense of another⁹³ (which implies impoverishment, and a causal link between the enrichment of one party and the impoverishment of the other) without justification,⁹⁴ in circumstances where none of the traditional remedies will be available.⁹⁵

While De Vos's work was generally welcomed, one drawback was that the general requirements were not described in sufficient detail and when the matter came before the Appellate Division in the much-discussed case of *Nortje v Pool*,⁹⁶ the response was a call for greater clarity and definition: 'Before the scope of such a general enrichment action is clearly delineated and the requirements thereof are clearly set out, something which is apparently still lacking, it [such a general action] would be a

⁸⁸ See De Vos *Verrykingsaanspreklikheid* 46, 95-6, 219-224; Eiselen and Pienaar *Unjustified Enrichment* 187 ff; Lotz (n 46) paras 93-4; Hutchison (ed) *Wille's Principles* 643; *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A).

⁸⁹ *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 487G.

⁹⁰ See De Vos *Verrykingsaanspreklikheid* 328.

⁹¹ Cf J E Scholtens 'The general enrichment action that was' (1966) 83 *SALJ* 391; Zimmermann *Law of Obligations* 886; Visser (n 2) at 351; *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 488.

⁹² *Verrykingsaanspreklikheid* 329 ff.

⁹³ *Verrykingsaanspreklikheid* 339 ff. De Vos was apparently influenced in this regard by German law: *op cit* 339nl. In this regard, see Reinhard Zimmermann 'Unjustified enrichment: the modern civilian approach' (1995) 15 *Oxford Journal of Legal Studies* 403 at 404: 'Apart from conjuring up the – mistaken – idea that the enrichment must intrinsically be related to a loss, it does not take us any further, as far as the first problem (identifying the plaintiff) is concerned.'

⁹⁴ *Verrykingsaanspreklikheid* 353 ff.

⁹⁵ *Verrykingsaanspreklikheid* 358 ff.

⁹⁶ *Nortje en 'n Ander v Pool NO supra*.

merely discretionary legal remedy which would just create uncertainty'.⁹⁷ Despite more recent efforts by South African academics, one cannot really say that this call has been answered. De Vos's work has therefore not really been translated into law by the courts⁹⁸ and, as a South African judge once remarked, unjustified enrichment is 'about the last arrow in the quiver of remedies'.⁹⁹

Even though it was subsequently convincingly proven that Roman-Dutch law had recognised a general enrichment action and therefore that *Nortje v Pool NO* had been incorrectly decided,¹⁰⁰ the courts still fairly consistently refused to recognise the existence of a general enrichment action or to apply De Vos's general requirements.¹⁰¹ This must, at least in part, be attributed to the fact that academics had not taken De Vos's analysis very much further.¹⁰² The approach of the courts over the last four decades, under the stultifying influence of *Nortje v Pool*, has thus merely been to apply the old remedies, extending them where necessary.¹⁰³

More recently, however, there have been signs that, when an appropriate case

⁹⁷ Translated from *Nortje en 'n Ander v Pool NO supra* at 140: 'Voordat die omvang van so 'n algemene verrykingsaksie duidelik omlin en die vereistes daarvan duidelik omskryf is, iets wat klaarblyklik nog ontbreek, sou dit [the recognition of such a general action] 'n blote diskresionêre regsmiddel wees was slegs onsekerheid sal skep.' See also the judgment of Rumpff JA at 117, where he says that he will not decide the question of a general enrichment action partly because it had not been argued thoroughly enough. Cf the comment by Visser (n 44) at 250: 'for the innate conservative approach of lawyers means that judges have to be specifically motivated to embark on a large scale revision of the law.'

⁹⁸ Except where his general requirements are 'dressed up' as the requirements of the *condictio sine causa* (see Chapter Three), and a few cases where they have been overtly applied (e g *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T).

⁹⁹ Per Schutz JA in *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) at 527.

¹⁰⁰ Scholtens (1966) 83 SALJ 391.

¹⁰¹ With a few exceptions, e g *Gouws v Jester Pools (Pty) Ltd supra*.

¹⁰² Although certain writers, such as De Vos himself, Scholtens, Visser, Eiselen and Pienaar, Van Zyl, Sonnekus and Du Plessis, have made significant contributions to the development of this area of law, the volume written on unjustified enrichment, and the depth and breadth of analysis do not compare favourably with other areas of private law, such as contract and delict. There is something of a vicious circle: because there are not many cases, there is less academic attention; because not much is written (relatively speaking), lawyers are less likely to take cases to court.

¹⁰³ On the extension of old remedies to accommodate new circumstances, see, e g, *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere supra*; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another supra*. A fairly recent example of a case where the court granted an enrichment claim although the case did not clearly fit into one of the traditional remedies is *Besselaar v Registrar, Durban and Coast Local Division and Others* 2002 (1) SA 191 (D).

arises, the Supreme Court of Appeal will be prepared finally to recognise a general basis for enrichment liability.¹⁰⁴ Thus, in an *obiter dictum* in *McCarthy Retail Ltd v Shortdistance Carriers CC*,¹⁰⁵ the late Schutz JA confirmed that *Nortje v Pool NO* had been incorrectly decided¹⁰⁶ and suggested that the court might ‘adopt a general action into modern law ... [when] that rare case ... arise[s] which cannot be accommodated within the existing framework and which compels such recognition.’¹⁰⁷ Although the court expressed some confidence in the general principles of enrichment liability, it also voiced its preference for the adoption of a subsidiary general action.¹⁰⁸ It seems, therefore, that even when the court does recognise a general enrichment action, the old remedies will not immediately lose their significance.

The recognition of a general enrichment action will create new opportunities and new challenges for enrichment lawyers. According to Zimmermann,¹⁰⁹ ‘[t]he recognition of a general enrichment action can only be a transitional stage: it provides the basis for a rational reorganisation of rules and precedents.’ We do not have to wait for the recognition of the general enrichment action to start this ‘rational reorganisation’. Academics, particularly, need to take a step beyond De Vos’s identification of the general principles of enrichment liability; to flesh out these somewhat skeletal principles and to give the law of enrichment a more scientific basis.¹¹⁰ In order to do this, ‘[s]ome form of typological fragmentation¹¹¹ must ... occur, certain structural refinements and

¹⁰⁴ And it seems that, while the courts have shied against it, they will have to shoulder the responsibility for the recognition or creation of such a general source of liability; the Law Commission, which began the task of formulating a statutory basis for general enrichment liability, abandoned the project.

¹⁰⁵ 2001 (3) SA 482 (SCA).

¹⁰⁶ At 488.

¹⁰⁷ At 489A.

¹⁰⁸ See the judgment of Schutz JA at 488D; Niall R Whitty and Daniel Visser ‘Unjustified enrichment’ in Zimmermann, Visser and Reid (n 68) 399.

¹⁰⁹ (1985) 18 *CJLSA* 1 at 20.

¹¹⁰ Rather than facilitating judicial recognition of a general basis for liability, this process could make it unnecessary. It is interesting to note that, historically, the tools used to forge a general enrichment action have been the contentious boundary cases of multi-party enrichment encountered in the texts on the *actio de in rem verso* and *negotiorum gestio*. It seems that, once they have served this function, they are cast aside as no longer useful.

¹¹¹ Regarding the importance of the development of a typological framework, see B Dickson ‘The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law’ [1987] 36 *ICLQ* 751, quoting Ernst von Caemmerer, at 779n129: ‘[N]ur mit einer...Typologie [der Bereicherungsansprüche], nicht mit einer Aufstellung allgemeiner Kriterien, lässt sich dem

conceptual tools have to be developed and a stable pattern of analysis be agreed upon, an indispensable harness preventing Pomponius' "natural justice" running wild.¹¹²

Analysis of one's own legal system is facilitated by a comparative approach: a comparative perspective is a more objective perspective. Thus '[Bacon] stated that the lawyer must free himself from the 'vincula' of his national system before he can estimate its true worth: the object of judgment (the national law) cannot be the standard of judgment. This perception, as valid now as ever, justifies all comparative researches.'¹¹³ The process of comparison not only sheds light on one's own legal system, but it can also 'provide a much richer range of model solutions than a legal science devoted to a single nation....'¹¹⁴ That said, which legal system or systems would provide the most help in the context of multi-party enrichment?

Choice of legal system for comparison

Of the legal systems which have experience with general enrichment actions, comparison with German law may be most fruitful.¹¹⁵ Apart from its appeal due to our shared historical background¹¹⁶ and its sophistication and its rich literature,¹¹⁷ the German law of enrichment particularly lends itself to comparison with South African law, because of the structural similarities of those areas of private law which abut it:¹¹⁸

¹¹² Bereicherungsanspruch Form und Grenze geben.'

¹¹³ Zimmermann *Law of Obligations* 892.

¹¹⁴ See K Zweigert and H Kötz *Introduction to Comparative Law* 3 ed (1998) (translated by T Weir) 50.

¹¹⁵ See Zweigert and Kötz (n 113) 15. Also see *op cit* at 11: 'comparative law can also aim to provide advice on legal policy. In its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances.'

¹¹⁶ I have chosen to compare South African law only with German law, and not with numerous other systems, bearing in mind the warning issued by Zweigert and Kötz (n 113) at 41: 'Here sober self-restraint is in order, not so much because it is hard to take account of everything as because experience shows that as soon as one tries to cover a wide range of legal systems the law of diminishing returns operates.'

¹¹⁷ One of the factors contributing to the 'style' of a legal system: see Zweigert and Kötz (n 113) 68-9. Another is its 'especially distinctive institutions' *op cit* 68, 71; we share some of these with German law e.g. what we would call *negotiorum gestio*, and the abstract real agreement: see below.

¹¹⁸ Particularly regarding three-cornered situations: see Medicus *Schuldrecht II* marg note 723, and see the text to note 179 below.

¹¹⁹ See Zimmermann (1985) 18 *CILSA* 1 at 3. It should be borne in mind, however, that according to the principle of abstraction, property law and the law of obligations are distinct from each other: see, e.g. Folke Schmidt 'The German abstract approach to law' (1965) 9 *Scandinavian*

the law of property, which in most cases determines whether an 'enrichment' has taken place,¹¹⁹ and the law of contract, which is often relevant in determining whether this enrichment was unjustified or not.¹²⁰

Most notably, within the context of property law, South African law¹²¹ and German law have in common the abstract principle of transfer of ownership,¹²² in accordance with which the validity of a transfer of property is independent of the validity of any underlying contract.¹²³ Thus, for example, if X transfers¹²⁴ a movable object to Y in accordance with a contract of sale, and it transpires that the contract of sale is invalid due to an error, this invalidity will not affect the validity of the transfer.¹²⁵ This is important because the law of unjustified enrichment in a sense acts as a

Studies in Law 133 at 144 ff. This distinction is apparent when one reads private law textbooks; it is relatively unusual to discover anything concerning property law in a contract text book, for example. Thus, to find out whether property transferred by a promisor to a third party pursuant to a *stipulatio alteri* would be transferred directly or 'via' the promisee, it is necessary to consult a property law textbook.

¹¹⁹ Paragraphs of the BGB that are relevant for this thesis include §§ 925-8 (which deal with acquisition and loss of ownership of land); §§ 929 ff (which deal with acquisition and loss of ownership of movable property).

¹²⁰ The similarities between the South African and German law of contract are important in that the edges of enrichment liability are, in a sense, determined by the edges of contractual liability. Thus the law of contract can be said to determine the scope of the law of enrichment. It is important to define these boundaries clearly, because of the different aims of contract law and enrichment law. The law of contract is aimed at effecting a change in the status quo in accordance with the wishes of the parties: when a contract comes into being, it must be fulfilled otherwise the contractual remedies aimed at the fulfilment (or its economic result e.g. where the contract is cancelled and damages are paid) thereof become available. The law of enrichment is aimed at reversing enrichment, and thus reverting to the status quo ante; where one party is enriched at the expense of another, he must return that enrichment, otherwise the enrichment remedies become available. In this regard, see Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403.

¹²¹ *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere* NNO 1978 (4) SA 281 (A); *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A).

¹²² See § 929 BGB, which stipulates that a 'real agreement' and delivery are necessary to effect transfer of ownership of movable property, unless the recipient is already in possession of the property, in which case the 'real agreement' alone will suffice. On the principle of abstraction in this context, see, e.g., Schmidt (1965) 9 *Scandinavian Studies in Law* 133 at 145 ff; Norbert Horn, Hein Kötz and Hans G Leser *German Private Law and Commercial Law: An Introduction* (transl Tony Weir) (1982) 83-4; Loewenheim *Bereicherungsrecht* 10; *Palandt* vor § 104 marg note 19.

¹²³ Logically, this also requires acceptance of the *Trennungsprinzip* ('separation principle'), according to which the act of transfer and the underlying contract, or other source of obligation, are seen as conceptually distinct.

¹²⁴ By means of delivery and conclusion of a 'real agreement'.

¹²⁵ See, e.g., Horn *et al* (n 122) 83.

'corrective' to this principle.¹²⁶ In our example, therefore, X would be able sue Y for unjustified enrichment in terms of both German and South African law. The fundamentals of the German law of contract are also immediately recognisable to South African lawyers and, unlike Anglo-American law, we make a similar distinction between remedies for breach of contract and for unjustified enrichment.¹²⁷ At a more fundamental level, our doctrines of subjective rights are apparently identical.¹²⁸

Of course, one should not be blind to the fact that, although there are similarities as far as the basic principles are concerned, there are also many differences in detail. Some of these differences are significant. A few instances drawn from the law of property that have important consequences within the law of enrichment are the relatively stronger position of the *bona fide* purchaser in German law, the existence of the so-called *Geheisserwerb*, and the scope of application of the abstract principle of transfer of ownership.

These may be illustrated with examples. Imagine that B borrows a specific object from its owner A and then sells it to C. The basic principle in South African law being *nemo plus iuris transferre potest quod ipse habet*, ownership would remain with A, regardless of the *bona fides* of C. German law, on the other hand, would allow the ultimate recipient to become owner provided that he was *bona fide*.¹²⁹ South African law would thus characterise this as a question to be dealt with in terms of property law

¹²⁶ Zimmermann *Law of Obligations* (1990) 867: '... in the words of the great pandectist Heinrich Dernburg, it is by means of an enrichment action that the law attempts to heal the wounds that it itself inflicts (by virtue of the abstract transfer of ownership).' Also see *idem* (1995) 15 *Oxford Journal of Legal Studies* 403 at 408; Horn *et al* (n 122) 69, 84; Loewenheim *Bereicherungsrecht* 11; *Palandt* vor § 104 marg note 19. The importance of the role of the abstract principle in delimiting the scope of the law of enrichment may be seen by the dramatic increase in cases of the *condictio indebiti* in South Africa upon recognition that the principle of abstraction was part of our law.

¹²⁷ See, for example, Dickson [1987] 36 *ICLQ* 751 at 762 ff. Marked similarities may be found in the law of suretyship, cession, etc in the two systems. Regarding cession, see Chapter Four below. For detailed discussions of the relationship between the law of contract and the law of unjustified enrichment in South Africa, see D P Visser 'Rethinking unjustified enrichment: A perspective of the competition between contractual and enrichment remedies' 1992 *Acta Juridica* 203; S Hutton 'Restitution after breach of contract: Rethinking the conventional jurisprudence' 1997 *Acta Juridica* 201; Saul Miller 'Unjustified enrichment and failed contracts' in Zimmermann, Visser and Reid (a 68).

¹²⁸ See Horn *et al* (n 122) 68 ff.

¹²⁹ § 932 ff BGB. See Dickson [1987] 36 *ICLQ* 751 at 777.

(A would have a *rei vindicatio*), whereas it would be seen as an enrichment problem in Germany.

The *Geheisserwerb* is a form of constructive delivery for which we have no exact equivalent. If A sells a movable thing to B, who, before he has received delivery of the object, in turn sells it to C, and B instructs A to deliver the thing directly to C, South African law would have no problem in saying that, provided that A intended to transfer ownership to C and C intended to receive ownership (i.e. provided that there was a real agreement between A and C), ownership would pass directly from A to C.¹³⁰ In terms of German law, however, ownership would pass from A to B to C.¹³¹

It appears that the abstract principle of ownership in South African law goes further than that of German law in one respect. Thus, in South African law, it appears that ownership will always be transferred if the 'real agreement' of transfer is valid;¹³² the reason for the defectiveness of any underlying obligatory contract is irrelevant.¹³³ In German law, on the other hand, the principle of abstraction is usually of no consequence in cases where the underlying contract involved fraud.¹³⁴

In the law of contract, too, there are differences in detail which can affect the scope of the law of enrichment. For example, in South African law, whereas an

¹³⁰ This would probably not occur with the transfer of immovable property, as the payment of transfer duty would necessitate a double transfer i.e. from A to B to C: see, by way of analogy, e.g. s 14 of the Deeds Registries Act 47 of 1937 and Hutchison (ed) *Wille's Principles* 495: 'As a result of legislation the cessionary of a deed of sale of immovable property cannot claim transfer from the seller direct to himself; transfer must first be passed to the cedent and from him to the cessionary and two payments of transfer duty are necessary.'

¹³¹ See Medicus *Bürgerliches Recht* marg note 671. The relevance of this will become apparent later in this thesis, particularly in Chapter Three. The consequence of this difference is that whereas this situation would be 'triangular' in terms of South African law, German law sees it as yet another 'performance chain': see pp 28 and 57 ff below.

¹³² Provided, of course, delivery – whether actual or constructive – also takes place.

¹³³ For example, in *Preller and Others v Jordaan* 1956 (1) SA 483 (A), the undue influence that led to the voidability of the doctor's contracts did not affect the validity of the conveyance of his farms.

¹³⁴ Horn *et al* (n 122) (1982) 84: 'In cases of deceit the principle of abstraction is not applied so sternly. Here there is an increasing tendency to allow rescission of the conveyance as well, even if the declaration induced by the deceit was in the obligatory contract. If both the obligatory and real transactions are rescinded, both of them, contract and conveyance, fall away. The transferor can then claim the property back just like any other owner (§ 985 BGB).'

enrichment remedy would be used to reclaim something transferred in terms of a void contract, the restitutionary remedy used in the context of a voidable contract is considered to be contractual (viz *restitutio in integrum*).¹³⁵ In German law, on the other hand, a plaintiff who wished to recover something transferred in terms of a voidable contract would have first to avoid it and then to bring an enrichment action, just as he would if the contract were void.¹³⁶

It should also be noted that the circumstances in which a contract will be void are more limited in German than in South African law. We would say that a material mistake leads to a contract being void, and therefore that any property transferred 'in terms of' this void contract could only be claimed back with an enrichment action, if at all. German law, on the other hand, would regard this purported contract as being voidable.¹³⁷ The practical result is the same, however, as German law regards avoided contracts as falling into the province of the law of enrichment, as explained above.

The significance of some of these points of distinction may be illustrated by example. If someone transfers movable property to another in terms of a contract that is voidable for misrepresentation, South African law would hold that the recipient would acquire ownership (provided that the requirements for transfer were met) and, upon rescission of the contract, the transferor would be able to recover the thing as a consequence of *restitutio in integrum*. In the same circumstances in Germany, however, ownership of the thing would not be transferred (as the abstraction principle does not

¹³⁵ In other words, although our law says that when a party avoids a voidable contract, the contract is extinguished with retroactive effect, some 'remnant' of that contract must remain – namely the obligation to effect *restitutio in integrum*. This is apparently sufficient to exclude avoided contracts from the domain of enrichment law. If one takes into account the differing functions fulfilled by the law of contract and the law of enrichment (see n 120 above), this does not make sense – enrichment law is aimed at 'undoing' enrichment, whereas contract is aimed at achieving the result intended by the parties. *Restitutio in integrum* would thus be more at home in the domain of enrichment law. See, e.g., Visser 1992 *Acta Juridica* 203.

¹³⁶ See, e.g., § 142 BGB regarding the retroactive effect of rescission. Note that this statement by Dickson [1987] 36 *ICLQ* 751 at 761 is misleading: 'If it is void or voidable, the remedy is to be found in the Code's paragraphs on unjustified enrichment'; one cannot bring an enrichment claim in the context of a voidable contract, but only where the contract has already been avoided i.e. made void with retrospective effect. Then it would be treated in the same way as another void contract. The quotation should therefore read 'If it is void or avoided...'.
¹³⁷ § 119 BGB.

apply in cases of deceit), and the first party would thus be able to vindicate his property.

If, on the other hand, the contract between the parties was defective as it was based upon a material mistake, ownership would nevertheless be transferred according to both South African and German law. In both legal systems, the thing could be reclaimed by means of an enrichment remedy; in South African law, this remedy would be available without further ado because the contract would be void *ab initio*; in German law, because the contract would be voidable, it would have to be avoided before an enrichment remedy could be brought.

We should proceed warily, therefore, remaining aware of the differences as well as the remarkable similarities between our legal systems. We should also not be so over-awed by the refinement of German law, particularly when seen from our relatively unsophisticated perspective, that we are tempted to follow its lead indiscriminately.¹³⁸ Regarding multi-party enrichment, in particular, we should remember that German lawyers themselves regard it as 'an almost impenetrable jungle of dispute and uncertainty'.¹³⁹ Its difficulties, however, are in themselves instructive, and we can gain much from its wealth of experience.¹⁴⁰

THE GERMAN LAW OF ENRICHMENT AND RELATED PRINCIPLES¹⁴¹

¹³⁸ See, for example, Visser (n 2) at 354n50, where the author specifically rejects the adoption of the German *Saldotheorie* into South African law. Cf De Vos's apparent adoption of the 'at the expense of' requirement from German law: see *Verrykingsaanspreeklikheid* 339n1.

¹³⁹ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 31.

¹⁴⁰ See, e.g., Zweigert and Kötz (n 113) at 36: 'RABEL once said that in their explorations on foreign territory comparatists may come upon "natives lying in wait with spears"...; but let his wit not frighten us out of ours.'

¹⁴¹ See, in general, (in English) B Markesinis, W Lorenz and G Dannemann *The German Law of Obligations* vol 1 *The Law of Contracts and Restitution* (1997); Zimmermann and Du Plessis [1994] *Restitution Law Review* 14; Dickson [1987] 36 *JCLQ* 751; Zimmermann (1985) 18 *CILSA* 1; and (in German) Medicus *Bürgerliches Recht* marg note 660 ff; Claus-Wilhelm Canaris 'Der Bereicherungsausgleich im Dreipersonenverhältnis' in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds) *Festschrift Karl Larenz zum 70. Geburtstag* (1973) 799; *Münchener Kommentar/Liebs* § 812 ff; Reuter and Martinek *Bereicherung* (1983); Medicus *Schuldrecht II* marg note 632 ff; Loewenheim *Bereicherungsrecht* (1997); Koppensteiner and Kramer *Bereicherung*; Larenz and Canaris *Lehrbuch des Schuldrechts II/2*.

The German law of enrichment in general¹⁴²

The cornerstone of the German law of enrichment is the general enrichment remedy contained in § 812 (1) BGB to the effect that 'a person who has acquired something through the performance of another or in any other way, without legal ground, at the expense of that other person, is obliged to restore it to him.'¹⁴³ The sections which follow serve to delimit more precisely the circumstances in which this action will lie.¹⁴⁴ For the purposes of this thesis the most important of these is probably § 822, which provides that

[i]f the recipient transfers the thing acquired gratuitously to a third party, and if in consequence of this the obligation of the recipient for return of the enrichment is excluded, the third party is bound to return the enrichment as if he had received it from the creditor without legal ground.¹⁴⁵

To look at only the code, however, is obviously to gain an incomplete picture of the modern German law of enrichment. The code has served as a catalyst for the development of a set of detailed and sophisticated rules by writers and the courts. Whereas the general action contained in the code is the culmination of a movement towards abstraction and generalisation,¹⁴⁶ the subsequent development has been in the direction of specificity.¹⁴⁷ Unlike South African law, however, this specificity is based, not on the collection of remedies which came from Roman law via the *ius commune*,¹⁴⁸ but on logical analysis. As far as developing our law is concerned, we should draw

¹⁴² See Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403.

¹⁴³ § 812 (1) 'Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder mit der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt.' (The second sentence may be translated thus: 'this obligation also comes into existence when the legal ground later falls away or when the intended result of performance, according to the content of the legal transaction, does not materialise.')

¹⁴⁴ For the full text of all of these paragraphs, together with a translation, see Appendix A.

¹⁴⁵ Translation taken from I S Forrester, S L Goren, and H M Ilgen *The German Civil Code* (1975).

¹⁴⁶ Led by von Savigny: see Zimmermann (1985) 18 *CILSA* 1 at 7 ff. The *Einheitslehre* espoused by, for example, Fritz Schulz, was also an attempt to find a general basis for enrichment liability: see Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 24.

¹⁴⁷ Cf the same process of distinction in the Roman law with regard to the *condictio*: see Zimmermann (1985) 18 *CILSA* 1 at 5.

¹⁴⁸ Whose outlines are still discernible in the BGB but which seem to be used as a kind of shorthand to refer to the situations in which they would lie, and to assist in marking out the application of the limiting sections of the code which follow § 812 BGB: see Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 18 ff.

inspiration, therefore, not so much from the ‘somewhat ramshackle structure’¹⁴⁹ of the *Bürgerliches Gesetzbuch*, but from the ‘imposing edifice’¹⁵⁰ created around it by the courts and commentators of the last hundred and five years.

The pioneer in recasting the German law of enrichment was Wilburg¹⁵¹ who freed it from its somewhat mystical associations¹⁵² and who, inspired by the wording of § 812 BGB, recognised that cases of enrichment fall into one of two broad categories: those which result from a performance¹⁵³ (*Leistung*) and those which do not. In other words, one must distinguish cases where a shift of assets was brought about by an act of will of the parties from those where it was not.¹⁵⁴ The remedy by which one reclaims enrichment resulting from ‘performance’ is thus called a *Leistungskondiktion*¹⁵⁵ and the remedy for reclaiming enrichment arising ‘in any other way’ is called a *Nichtleistungskondiktion*.¹⁵⁶ Although there was some opposition to the notion of dividing the law of enrichment, this distinction¹⁵⁷ was accepted by the courts and the most important writers¹⁵⁸ and has had a profound influence on the subsequent development of German enrichment law.

Central to this distinction is obviously the concept of *Leistung*. As interpreted by the German courts in the context of enrichment, it denotes something more general than merely a ‘transfer’ (which, on its own, to South African lawyers seems to denote a transfer of ownership) but something less general than a ‘performance’, as South African

¹⁴⁹ Dawson (n 17) 789. Also see Zimmermann (1985) 18 *CILSA* 1 at 8 ff: ‘Neither this rule which came to be § 812 I BGB, nor the title on unjustified enrichment as a whole, can be called a legislative masterpiece.’

¹⁵⁰ Dickson [1987] 36 *ICLQ* 751 at 772.

¹⁵¹ Dickson [1987] 36 *ICLQ* 751 at 771.

¹⁵² Dawson (n 17) at 796.

¹⁵³ As translated by, for example, Dawson (n 17) 797 ff. But cf Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 25 ff; Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 405 ff and Zimmermann *Law of Obligations* 889, where *Leistung* is translated as ‘transfer’.

For further discussion of this concept, see p 38 ff below.

¹⁵⁴ See, e.g., Loewenheim *Bereicherungsrecht* 10.

¹⁵⁵ I.e., very literally, a ‘performance-*condictio*’.

¹⁵⁶ A ‘non-performance-*condictio*.’ Regarding the *Nichtleistungskonditionen*, see Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 417 ff.

¹⁵⁷ *Trennungslehre*, or ‘theory of distinction/separation’.

¹⁵⁸ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 25; Zimmermann (1985) 18 *CILSA* 1 at 14. See Medicus *Bürgerliches Recht* marg note 665 for criticism.

lawyers would understand it.¹⁵⁹ It is, in essence, the 'enlargement of another's estate which is brought about by the transferor consciously and with a specific purpose in mind.'¹⁶⁰

Following Wilburg's lead, other commentators have since carried the process of distinction further.¹⁶¹ For example, most influentially, von Caemmerer¹⁶² divided the *Nichtleistung* ('non-performance') cases into the:

- 1 *Eingriffskondiktion*,¹⁶³ where the enrichment resulted from encroachment or interference (*Eingriff*). It is available where, in the absence of fault on his part, the defendant used or consumed another's property (*Sachverbrauch*),¹⁶⁴ or disposed of it to a third party,¹⁶⁵ or where he managed the affairs of another as if they were his own, while knowing that they were not.
- 2 *Rückgriffskondiktion* or 'recourse action',¹⁶⁶ where the plaintiff has performed in terms of the obligation of another.
- 3 *Aufwendungskondiktion* (also called a *Verwendungskondiktion*) or 'expenditure action',¹⁶⁷ where the plaintiff has incurred expenses (or performed services) in regard to the property of another.

The common denominator of the *Nichtleistung* ('non-performance') cases is that they have to do with the protection of property, whereas the *Leistungskondiktion* deals with

¹⁵⁹ South African lawyers would understand 'transfer' on its own to refer to a transfer of ownership or, if specifically stated, of possession or some other benefit but not of a *factum*. Cf Detlef Liebs 'The history of the Roman *condictio* up to Justinian' in *The Legal Mind: Essays for Tony Honoré* (1986) 163 at 167n23, where he translates the word *datio* as 'Leistung'. 'Performance', on the other hand, is usually used in the law of contract, where its content depends on what was agreed by the parties. Dickson [1987] 36 *ICLQ* 751 at 773n102 suggests 'conferment of a benefit'.

¹⁶⁰ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 25. Cf Dickson [1987] 36 *ICLQ* 751 at 773n102.

¹⁶¹ Dickson [1987] 36 *ICLQ* 751 at 779 ff.

¹⁶² Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 25; Dickson [1987] 36 *ICLQ* 751 at 771.

¹⁶³ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 27-29; Dickson [1987] 36 *ICLQ* 751 at 771; Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 418 ff.

¹⁶⁴ § 812 (1) sent 1 Alt 2: Dickson [1987] 36 *ICLQ* 751 at 776.

¹⁶⁵ § 816 (1) sent 1: Dickson [1987] 36 *ICLQ* 751 at 777.

¹⁶⁶ Dickson [1987] 36 *ICLQ* 751 at 771 and 779; Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 29-30; Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 423.

¹⁶⁷ Dickson [1987] 36 *ICLQ* 751 at 771 and 779; Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 30; Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 421.

the conveyance of property, or shifting of assets.¹⁶⁸ This subdivision, too, has gained general acceptance and forms an integral part of the modern German law of enrichment.¹⁶⁹

The law of enrichment, generally, has always been regarded as an area of difficulty.¹⁷⁰ This is also true within German law. Thus we find uncharacteristically impassioned calls for its clarification: 'While private law in general demonstrates fundamental clarity, the law of enrichment has always remained in a certain chiaroscuro, for whose elimination we yearn.'¹⁷¹ Not only its basic principles but also its details are known for being exceptionally controversial.¹⁷² In some respects, its inherent problems are compounded, rather than cured, by the multitude of opinions found in a 'vast flood of literature and judgments.'¹⁷³ Thus a famous professor has complained that '[e]ven regarding simple cases, students entangle themselves in a host of theories and then can no longer achieve any reasonable and logically consistent solution.'¹⁷⁴

Multi-party enrichment in German law

The most notorious difficulties in enrichment law arise in what has proved to be its main battleground: the area of multi-party enrichment.¹⁷⁵ Some of these difficulties arise from the nature of the legal problems that they expose. Thus the so-called three-cornered relationships have been characterised as the most controversial and most

¹⁶⁸ See Loewenheim *Bereicherungsrecht* 10.

¹⁶⁹ On the views of Wilburg and von Caemmerer, see Loewenheim *Bereicherungsrecht* 10.

¹⁷⁰ See, for example, the exclamations of Duarenus (Com. De condictione indebiti, cap 1) quoted by Walther Hadding *Der Bereicherungsausgleich beim Vertrag zu Rechten Dritter* (1970) in his foreword: 'inter conditiones ... haec insignis et praecipua est nec ullus locus est in iure civili aut memorabilior aut obscurior et difficilior.'

¹⁷¹ 'Während das Privatrecht ... im Allgemeinen grundsätzliche Klarheit zeigt, ... ist das Bereicherungsrecht von jeher in einem gewissen Helldunkel geblieben, nach dessen Beseitigung wir verlangen.' A Hartmann *ArchB* 21, 224.

¹⁷² Koppensteiner and Kramer *Bereicherung*, foreword.

¹⁷³ Wieling *Bereicherungsrecht*, foreword, p VII: 'unübersehbare ... Flut der Literatur und Rechtsprechung'. Also see Koppensteiner and Kramer who refer to a 'literature that has in recent years 'exploded into infinity'.

¹⁷⁴ Medicus *Bürgerliches Recht* marg note 665: 'daß Studenten sich selbst bei einfachen Bereicherungsfällen in eine Fülle von Theorien verstricken und dann zu keiner vernünftigen und konsequenten Lösung mehr gelangen'.

¹⁷⁵ See, e.g., Loewenheim *Bereicherungsrecht* 30, where he says that 'the real difficulties begin when three or more parties are involved.'

difficult of all problematic areas of private law,¹⁷⁶ and ‘an inexhaustible source of lawsuits and problems.’¹⁷⁷ In short, it is regarded by many as the ‘nightmare of enrichment law’.¹⁷⁸ As with the rest of enrichment law, in attempting to solve these problems, the lawyers have created another: a literature that is so voluminous that it is unmanageable. Thus Wieling says that ‘[t]he number of different opinions voiced on these [issues] is legion...’.¹⁷⁹ It has even been rumoured that, in view of its difficulty, students should not be examined on the subject.¹⁸⁰

It has already been mentioned that multi-party enrichment is important in practice, as is demonstrated by the number of cases in this field.¹⁸¹ How then, have the courts approached the matter? Many judgments dealing with such cases begin with a kind of disclaimer that is so often repeated that it is almost like a mantra.¹⁸² The judges say that, in enrichment cases involving more than two parties, ‘any schematic solution is forbidden.’¹⁸³ Thus each case must be decided on its own merits, rather than on the basis of general principles. The judges then typically go on to discuss similar decisions and the views of writers before coming to a conclusion.

At first sight, this sort of incremental approach and apparent aversion to abstract legal principles seem ‘un-German,’ and rather surprising to an outsider in the light of the general reputation of German law.¹⁸⁴ It should be pointed out, however that,

¹⁷⁶ Larenz and Canaris *Schuldrecht* II/2 at 199.

¹⁷⁷ Karsten Schmidt ‘Bereicherungsausgleich bei Geschäftsunfähigkeit des Anweisenden’ 1991 *JuS* 75: ‘unerschöpflicher Quell von Prozessen und Problemen’.

¹⁷⁸ ‘Albtraum des Bereicherungsrechts’: Peter Schlechtriem *Schuldrecht Besonderer Teil* 4 ed (1995) marg note 685.

¹⁷⁹ Wieling *Bereicherungsrecht* 87: ‘Die Zahl der hierzu geäußerten verschiedenen Ansichten ist Legion...’.

¹⁸⁰ Horst Heinrich Jakobs ‘Die Rückkehr der Praxis zur Regelanwendung und der Beruf der Theorie im Recht der Leistungskondiktion’ 1992 *NJW* 2524. Cf Claus-Wilhelm Canaris ‘Überforderte Professoren?!’ 1992 *NJW* 3134 and Michael Martinek ‘Die veranlaßte Drittleistung oder “Haare in der Suppe”’ 1992 *NJW* 3141.

¹⁸¹ See Löwenheim *Bereicherungsrecht* 30.

¹⁸² Cf the comments of Lorenz, who describes it as a ‘sattsam bekannte salvatorische Klausel’: W Lorenz ‘Abtretung einer Forderung aus mangelhaftem Kausalverhältnis: Von wem kondiziert der Schuldner?’ (1991) 191 *AcP* 279 at 280).

¹⁸³ See, e.g., BGHZ 105, 365 at 369; BGHZ 50, 227 at 229; BGHZ 58, 184 at 187; BGHZ 61, 289 at 292; BGHZ 72, 246 at 250; BGHZ 87, 393 at 396; BGHZ 88, 232 at 235; BGH WM 1984, 423; BGHZ 122, 46 at 53.

¹⁸⁴ See Zweigert and Kötz (n 113) 69 regarding the differences of style between continental systems

notwithstanding their caveat that there is no 'schematic solution' for such cases, the courts seem to strive for principles,¹⁸⁵ and the views of academics are given more weight than they would be in most common-law jurisdictions.¹⁸⁶

The response of the writers to the mass of reported cases has also been similar to what one would expect in a common-law, or case-based, system. Rather than proceeding from the statute and general rules, the approach of the writers has been to group cases into 'factual constellations'. In other words, like common lawyers, they identify clusters of cases with similar facts, and then try to work out sets of rules for each of them. The similarity of approach between German lawyers and common-law or South African lawyers in this regard should not be overstated, however. For example, the sets of facts which the Germans use to slot a case into a particular pigeonhole are still fairly abstract. A comparison with South African law makes this clear. In South Africa, for instance, some writers identify a group of enrichment cases as being 'the garage repair cases'.¹⁸⁷ A German lawyer would rather look at the fundamental legal relationships that characterise such cases and would therefore identify them as cases of 'Verwendungen in Eigentümer-Besitzer-Verhältnisse',¹⁸⁸ i.e. 'expenditure in owner-possessor relationships'.¹⁸⁹

and English common law. They refer to the Germanic 'tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law, and to think up and to think in juristic constructions.' This is contrasted with the English approach of 'gradual development from decision to decision....' They add that '[o]n the Continent lawyers think abstractly, in terms of institutions; in England, concretely, in terms of cases, the relationship of the parties, "rights and duties". On the Continent, the system is conceived as being complete and free from gaps, in England lawyers feel their way gradually from case to case. On the Continent lawyers delight in systematics, in England they are sceptical of every generalization.' But also see their comments at 37: 'But we must not too readily infer that it is only the Continental systems, with their tendency to abstraction and generalization, which develop the grand comprehensive concepts, while the Common law, with its inductive and makeshift habits, produces low-level legal institutions specially adapted to solve particular concrete problems. Things may be the other way around.' This seems to be one of those instances.

¹⁸⁵ In this regard, see Werner Flume 'Der Bereicherungsausgleich in Mehrpersonenverhältnissen' (1999) 199 *AcP* 1.

¹⁸⁶ See, for example, Zweigert and Kötz (n 113) 69 on the relative importance of professors rather than judges in German law.

¹⁸⁷ See, e.g., Visser and Miller (2000) 117 *SALJ* 594.

¹⁸⁸ See Dirk A. Versé *Verwendungen im Eigentümer-Besitzer-Verhältnis* (1999).

¹⁸⁹ Cf the comments of Zweigert and Kötz (n 113) cited in note 184 above.

Other clusters of cases identified by German writers include the following: Situations where A concludes a contract with B in terms of which he transfers something to B, and B transfers it to C (in terms of another contract), but one of the contracts is invalid. Then there are situations where B owes money to C and instructs A (who may in turn owes him money) to pay C on his behalf; A pays C but one of the legal links is legally defective.¹⁹⁰ Or B might owe C something other than money, and instruct A (who in turn owes him this thing, which he, A, still owns) to deliver it to C on his behalf.¹⁹¹ Again A makes the transfer to C, but one of the obligatory relationships is defective. Another category includes cases where A and B conclude an agreement in terms of which A will perform to C on B's behalf (i.e., in our terms, a *stipulatio alteri*), A makes the performance but the contract between A and B (or one between B and C) is void. Or A might perform to C because he is ostensibly obliged to do so in terms of a suretyship agreement between himself and C, to secure a debt owed by B to C, but, again one of the legal relationships is defective. Many other examples could be cited; one commentator has, for example, identified thirteen factual constellations within one category of multi-party enrichment.¹⁹²

Most writers do not organise these clusters of case into a rational framework. One distinction that is accepted by many writers, however, is that cases of multi-party enrichment resulting from *Leistungen* ('performances') can be divided into two categories namely 'enrichment chains' (*Leistungsketten*) and 'triangular relationships' (*Dreiecksverhältnisse*). Cases categorised as 'enrichment chains' are those where there are two or more successive transfers or other performances. For example, A transfers movable property to B in terms of a contract of sale, and B transfers the same property to C in terms of another contract of sale, and either one (or both) of the contracts is void. In 'triangular situations', A also concludes a contract with B, and B concludes a contract with C and one of the contracts is defective. The difference is that A does not hand property (or perform a service) to B, but rather does so directly to C. In other words, in

¹⁹⁰ The cases of a so-called 'order', or 'instruction'. See Chapter Three in this regard.

¹⁹¹ Some writers would include this under the heading of an *Anweisung*; others separate out such cases into a category of their own viz that of the *Gehislerwerb*.

¹⁹² *Münchener Kommentar*/Lüb § 812 – within the category of 'triangular relationships'.

a triangular situation, B is 'leapfrogged'.¹⁹³ Thus, for example, if the contracts between A and B, and B and C, were contracts of sale of movable property, A would hand the thing directly to C in a triangular situation, rather than via B, as would happen in the linear situation typified by 'enrichment chains'.

The focus of attention in German law falls on the triangular situations, which are seen as the most problematic of all multi-party cases. The majority of case-clusters mentioned above fall into this category.¹⁹⁴ Beyond the identification of sets of typically-occurring facts, it is difficult to find any sort of rational organisation within this category.¹⁹⁵ With a few exceptions,¹⁹⁶ the writers usually just list the case-clusters in any arbitrary order. It is quite common to start with the set of facts that arises most often in practice (the cases where B instructs A to perform to his (C's) creditor) and then to use this as a springboard for a discussion of the less common situations. Even the defining characteristics (and hence the boundaries) of the various constellations vary from author to author. It is therefore strange to see that writers spend a great deal of time arguing whether a particular case falls into one or other constellation, in a manner reminiscent of our contortions to squeeze a case into the ambit of one or other of our traditional enrichment remedies.¹⁹⁷

As mentioned above, the triangular situations lie on the *Leistung* side of the Wilburg-divide. Some cases of multi-party enrichment involve *Nichtleistungen*, however,¹⁹⁸ and these will be considered briefly, before the notion of 'performance' is explored in more detail. Most of these cases are covered by their own specific paragraphs of the BGB.¹⁹⁹

¹⁹³ See Medicus *Schuldrecht II* marg note 727.

¹⁹⁴ And the qualms expressed by the writers quoted above also refer to this category of cases.

¹⁹⁵ Cf the comments of Zimmermann quoted at p 15 above.

¹⁹⁶ E.g. Wieling *Bereicherungsrecht* 87 ff.

¹⁹⁷ For an example of a court concerning itself with the question of the categorisation of the case before it, see *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA 41 (T). But cf, e.g., *Pahad v Director of Food Supplies and Distribution* 1949 (3) SA (A) at 712.

¹⁹⁸ See Medicus *Schuldrecht II* marg note 732.

¹⁹⁹ Medicus *Schuldrecht II* marg note 723. This surely means that the scope of application of the 'at the expense of' requirement is extremely narrow. Cf De Vos *Verrykingsaanspreeklikheid* who was apparently influenced by German law in this regard (see 339a1) but he makes it apply across the board. See also C P Joubert (1959) *SALJ* 471 at 475-476. Generally speaking, multi-party

1 The first of these paragraphs is § 816 BGB, which deals with a disposition by a party who was not entitled to make it. It would be applicable in the following sort of situation: someone who has no title (B) disposes of an object to a third party (C), either for value or gratuitously, where this transaction is effective as against the (former) titleholder (A). If the disposition was made for value, the person who previously held the title (A) can bring an enrichment action, not against the ultimate recipient of the disposition (C), but against the person who made it without being entitled (B). If the disposition was gratuitous, on the other hand, the previously-entitled party (A) can sue the third party (C) directly.²⁰⁰ The *Nichtleistungskondiktion* available in such cases is an *Eingriffskondiktion*.

2 One of the *Eingriffskonditionen* not dealt with in its own special paragraph of the BGB but which is covered by § 812 BGB is that used in the case of *Sachverbrauch* i.e. 'unauthorised consumption of another's property'.²⁰¹

3 § 951 (1) sent 1 BGB allows someone who has lost a right, for example by *accessio*, *confusio*, *commixtio*, or *specificatio* to claim monetary compensation for that loss.²⁰²

4 Finally, the *Rückgriffskondiktion* is available where a third party (A) performs to another (B) in terms of an obligation owed by B's debtor (C). In such a situation, A may seek recourse directly against C.²⁰³

cases involving *Nichtleistungen* are regarded as being less problematic than other cases of multi-party enrichment (the specific provisions of the BGB mentioned in the text identify the parties to the action); most of the comments quoted at the beginning of this section were directed at the notorious 'triangular relationships'. An exception is the case where liability arises in terms of § 951 BGB: see Visser and Millèr (2000) 117 *SALJ* 594 in this regard.

²⁰⁰ Medicus *Schuldrecht II* 9 698 ff, 723 and 732; Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 27-28.

²⁰¹ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 29. For details, see Medicus *Schuldrecht II* marg note 733.

²⁰² Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 29. In this regard, also see Visser and Millèr (2000) 117 *SALJ* 594.

²⁰³ Medicus *Schuldrecht II* marg notes 719 ff.

It must also be remembered that if someone has been unjustifiably enriched (whether by a *Leistung* or a *Nichtleistung*), and he gratuitously transfers the enrichment to a third party, the original owner can always sue the third party directly for the return of the enrichment.²⁰⁴

Now the concept of a *Leistung* ('performance'), one of the most important theoretical concepts in the modern German law of enrichment, must be examined in closer detail because it runs through this thesis (and the German law of multi-party enrichment) like a golden thread.

'Performance' in general²⁰⁵

The concept of 'performance' is, in some ways, the pivot upon which the German law of unjustified enrichment turns. It is easier to understand if it is seen against the background of the rules relating to performance in the law of obligations in general. Certain of these rules are also important for an understanding of subsequent chapters of this thesis.

A performance may be made in fulfilment of an obligation or it may be made where no obligation exists. Where a performance has been made in order to fulfil an obligation, it may or may not correspond exactly with the terms of that obligation.

1 Where the performance corresponds to an obligation

First I will consider the rules relating to performance that corresponds exactly with the terms of the relevant obligation. The first question that comes to mind is: what exactly is a 'performance'? In other words, when can one say that performance has been effected? In this regard, a terminological issue must be addressed. In English, it is sometimes said that an obligation is 'performed'. It would be more correct to say that the obligation is 'fulfilled' or 'discharged' by the performance in question. In other

²⁰⁴ In terms of § 822 BGB. See Medicus *Schuldrecht II* marg notes 690-1; Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 28.

²⁰⁵ For an evaluation of the South African notion of 'performance', see J E du Plessis 'Die Regsaard van Prestasie' (2002) 65 *THRHR* 59.

words, the word 'performance' is sometimes used to refer to both the performance and to its effect on the obligation. This confusion does not generally arise in German because the word 'Leistung' is used for the performance made by the performing party, and the words 'Erfüllung'²⁰⁶ or 'Erlöschen'²⁰⁷ for the effect of that performance upon the obligation (i.e. fulfilment or discharge). In this thesis, I will try to use the words 'perform' or 'performance' in such a way as to avoid this type of confusion.²⁰⁸

Performance usually entails acting or refraining from acting. Thus a seller performs in terms of his contractual obligation by delivering goods. Various theories have been developed to deal with the question whether the performance necessary for fulfilment of an obligation also has a subjective component.

The oldest theory is the *Vertragstheorie* (the 'contract theory') which required, for fulfilment of an obligation, not only factual performance but also a 'contract for fulfilment'. In other words, the parties had to conclude an agreement that the performance in question took place *as fulfilment* of a particular obligation.²⁰⁹ Performance was thus necessarily bilateral.²¹⁰ In other words, for example, if X concluded a contract in terms of which he was to mow Y's lawn, he and Y would have to conclude another agreement when X actually mowed the lawn, to the effect that the mowing amounted to the performance required by their contract, and that it therefore discharged his obligation. One of the disadvantages of this theory is that, as consensus is required, the parties must both have legal capacity to act.²¹¹ This is unproblematic where the performance in question constitutes a legal act (such as transfer of ownership),

²⁰⁶ See, for example, § 364 BGB.

²⁰⁷ See, for example, § 362 BGB.

²⁰⁸ I.e. I will use these words to refer to the act (or omission), together with any other requirements for performance, by which the performing party seeks to discharge his obligation, and not to the result of that performance.

²⁰⁹ See, e.g., Medicus *Schuldrecht I* marg note 237.

²¹⁰ Cf the South African approach reflected in cases such as, recently, *Vereins-und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA). Cf J E du Pléssis 'Die regsaard van prestasie' (2002) 65 *THRHR* 57.

²¹¹ Logically, this would usually only arise in the context of a contractual obligation where someone had contractual capacity at the time of conclusion of the contract, but lost it before performance i.e. before the 'contract for fulfilment' was purportedly concluded. Or it could arise in the context of obligations which are conferred by the law i.e. where no capacity to act is required.

but it is difficult to see why it should be required where the performance takes the form of not doing something, for example, or of doing something that does not amount to a legal act.

This was superseded by what is now the prevailing doctrine:²¹² the theory of the *reale Leistungsbewirkung* (the theory of the 'real effecting of performance'). In terms of this theory, all that is required is the effecting of the *Leistungserfolg* (literally, a 'performance-result') through an act of performance that corresponds recognisably to what is owed. To put it simply, in a contractual context this means that an obligation will be discharged if one does exactly what one has promised to do. This approach reflects common sense and conforms more closely than the *Vertragstheorie* to the wording of the BGB's main provision on discharge of an obligation by performance,²¹³ which does not explicitly require a meeting of minds.²¹⁴ It also has the advantage of not requiring the capacity of the debtor as is logically required in terms of the *Vertragstheorie*. Thus it is only necessary for the performing party to have the capacity to act where the performance takes the form of a legal act, and parties without legal capacity can fulfil obligations to make purely factual performances, or to refrain from acting.

A third theory has been developed by Gernhuber and Bülow: the theory of the *finale Leistungsbewirkung* (the theory of 'purposive effecting of performance'). They argue that a *reale Leistungsbewirkung* is not enough; the performing party must also direct his performance towards a particular debt by determining his purpose (*Zweckbestimmung*).²¹⁵ In other words, he must not only perform the required act, but he must intend to do so in fulfilment of the debt in question. The difference between

²¹² See Medicus *Schuldrecht I* marg note 237; *Münchener Kommentar/Heinrichs* § 362 marg notes 5 ff.

²¹³ § 362 (1) BGB which reads: '[Erlöschen durch Leistung] (1) Das Schuldverhältnis erlischt, wenn die geschuldete Leistung an den Gläubiger bewirkt wird.' (The debt is discharged when the owed performance is effected to the creditor.)

²¹⁴ It should be borne in mind, as Medicus points out (*Schuldrecht I* marg note 237), that while agreements are sometimes necessary for performance e.g. where ownership of movable property is transferred (i.e. the 'real agreement' in terms of § 929 BGB) or where a claim is ceded (in terms of § 398 BGB), no additional agreement is required for extinction of an obligation.

²¹⁵ Medicus *Schuldrecht I* marg note 237.

this theory and the theory of the *reale Leistungsbewirkung* (i.e. the theory supported by the majority) is that a subjective component is required; the difference between this theory and the *Vertragstheorie* is that the subjective component is unilateral and not bilateral.

It seems that the main reason for requiring this determination of performance, or *Zweckbestimmung*, is that it plays an important role in the law of unjustified enrichment²¹⁶ i.e. it is necessary for reasons of coherence. It also has the advantage that the debtor can thus eliminate any doubt as to the purpose of the performance. This theory has, however, not met with general acceptance. Brox, for example, argues that while the debtor *can* determine the purpose of the performance, fulfilment can happen even in the absence of such a *Zweckbestimmung*; thus if a debtor owes multiple performances and makes a performance without determining which debt should be settled first, the debts will be extinguished in an order determined by the BGB.²¹⁷ Medicus, on the other hand, argues that this theory merely expresses the majority view (the theory of the *reale Leistungsbewirkung*) in a different way, in that the performance is usually linked to a particular debt by the will of the performing party or via the rules determining the order of performance.²¹⁸

The theory of the *finale Leistungsbewirkung* has thus not convinced the majority, which still holds the view that all that is required for fulfilment is an actual performance corresponding to whatever is owed i.e. there is no subjective component to performance or fulfilment.

An exception to this general rule, however, arises in cases where the debtor is obliged, in terms of several different obligations, to make various performances of the same kind to the same creditor and he makes a performance which is not sufficient to settle all the debts. In such circumstances, the intention of the debtor determines which

²¹⁶ See, e.g., Medicus *Schuldrecht I* marg note 237.

²¹⁷ In § 366 (2).

²¹⁸ I.e. § 366 (2) BGB; Medicus *Schuldrecht I* marg note 237.

debt/s is/are settled.²¹⁹ The consent of the creditor is not necessary. Thus the debtor can unilaterally determine which debt/s he wishes to settle by means of this performance. As mentioned above, if he makes no such determination (*Tilgungsbestimmung*, or 'determination of settlement'), the debts will be settled according to an order of precedence set out in the BGB: thus debts that are due will be discharged first; then debts that are less secured; then debts that are more onerous; and so on.²²⁰ Even here, the intention of the debtor is indirectly relevant in that this order of precedence is based on the legislature's assumption that this is what the parties would reasonably intend. If, therefore, it is clear from the facts that the order of precedence is not in accordance with the will of the debtor, then it will not apply. The intention of the debtor is totally irrelevant, however, where there is only one claim that consists of the main performance, interest and costs. In such a case, the BGB says that the costs will be settled first, then interest and then the main claim.²²¹

The next question that may be asked is: who must perform to whom? The BGB does not specify who must make the performance in question. Thus it need not be made by the debtor himself, unless the contract is such that personal performance is necessary.²²² In other words, a third party may perform in terms of the debtor's obligation, and thereby discharge it, unless the contract requires personal performance. The consent of the debtor is not required²²³ but, if the debtor objects to the performance, the creditor may refuse to accept it.²²⁴ A third party who performs in terms of another's obligation must intend to do so. His intention is not determined subjectively, however; it will suffice if the creditor would think that he intended to perform in terms of that debt. In other words, it is not his actual will that is important, but how it is understood from an objective point of view.²²⁵

²¹⁹ § 366 (1) BGB. Unless it is clear from the nature of the performance which obligation is to be settled: see Medicus *Schuldrecht I* marg note 231.

²²⁰ § 366 (2) BGB. Also see Medicus *Schuldrecht I* marg note 234.

²²¹ § 367 (1) BGB.

²²² § 267 BGB. This question will be considered in more detail in Chapter Two of this thesis.

²²³ § 267 (1) BGB.

²²⁴ § 267 (2) BGB

²²⁵ See Kröpholler *BGB* § 267 marg note 2; *Palandt* § 267 marg note 4 and Chapter Two below.

Sometimes the performance is made, not by the debtor himself, but by an *Erfüllungsgehilfe*, namely a ‘person employed in performing an obligation for whom the principal is vicariously liable’²²⁶ or an agent. Thus the obligations of a business may be fulfilled by its employees. An *Erfüllungsgehilfe* is not regarded as a third party for the purposes of performance;²²⁷ he acts more like a conduit for the debtor’s performance.

The performance must generally be made to the creditor. As a general rule, therefore, performance to a third party will not extinguish the obligation.²²⁸ By way of exception, however, it may do so in certain circumstances. Thus the obligation will be discharged where the creditor has given his prior consent to performance to a third party,²²⁹ or where he has ratified performance to a third party.²³⁰ The law which protects a party’s reliance will sometimes lead to discharge of a debt by performance to someone other than the creditor.²³¹ If a debtor performs to the cedent of a claim against him, this performance will discharge the claim now held by the cessionary.²³² Similarly, performance to a third party may discharge a debt if someone performs in good faith to the holder of a *Wertpapier* (e.g. a cheque) in terms of the law of negotiable instruments.²³³

In certain circumstances, even performance to the creditor will not have the effect of extinguishing the obligation. For example, performance to an insolvent creditor will not discharge a debt.²³⁴

Should a performance comply with the rules explained above, the effect will be extinction of the debt.

²²⁶ Alfred Römán *Wörterbuch der Rechts- und Wirtschaftssprache Teil II* 3 ed (1994) q.v. For details, see Medicus *Schuldrecht I* marg notes 318 ff. See § 278 BGB in this regard.

²²⁷ I.e. his performance will not be made in terms of § 267 BGB; also see Kröpholler *BGB* § 267 marg note 1.

²²⁸ Medicus *Schuldrecht I* marg note 225.

²²⁹ § 185 (1) BGB.

²³⁰ § 185 (2) BGB.

²³¹ See Medicus *Schuldrecht I* marg note 227.

²³² See § 407 (1) BGB. Also see § 408 BGB, and Chapter Four below.

²³³ For these examples, see Medicus *Schuldrecht I* marg note 227.

²³⁴ See Medicus *Schuldrecht I* marg note 228, where he also discusses the question whether performance to a minor will be effective.

2 Where the performance does not correspond to the obligation

What if the performance in question is not exactly what was envisaged in the contract?

Such cases can either be *Leistungen an Erfüllungs Statt* or *Leistungen erfüllungshalber*.²³⁵ These terms can perhaps best be translated as ‘alternative performances’ (*Leistungen an Erfüllungs Statt*) and ‘provisional performances’ (*Leistungen erfüllungshalber*) and the main distinction between the two categories is that only performances *an Erfüllungs Statt* will extinguish the original obligation.²³⁶ Which category a particular performance will fall into is a question of interpretation.²³⁷

(a) *Leistungen an Erfüllungs Statt*

The obligation will be extinguished by a performance other than that agreed upon by the parties provided that the creditor accepts this performance in fulfilment of the obligation.²³⁸ Thus, for example, X owes Y €500 in terms of a loan agreement. Instead of handing over the money, however, X gives Y a television set. If Y accepts this as performance, the original debt will be discharged. If Y does not accept this as performance, X will have breached the loan agreement.

(b) *Leistungen erfüllungshalber*

In a case of ‘provisional performance’, on the other hand, the obligation will not be extinguished by the performance alone.²³⁹ The creditor has to try to get satisfaction by using the object that is given to him in performance of the obligation.²⁴⁰ Only if his attempt is successful will the obligation be extinguished. This rather cryptic rule makes

²³⁵ See Medicus *Schuldrecht I* marg notes 241 ff. Or it could be made for purposes of security e.g. A cannot pay his debt so hands over one of his assets as security; in such cases the original debt will stand. In this regard, see Medicus *op cit* marg note 241.

²³⁶ See Medicus *Schuldrecht I* marg notes 242-3; 245 and 247.

²³⁷ Medicus *Schuldrecht I* marg note 244.

²³⁸ §§ 364 ff BGB; Medicus *Schuldrecht I* marg notes 243 and 247. See § 364 (1) BGB: ‘Das Schuldverhältnis erlischt, wenn der Gläubiger eine andere als die geschuldete Leistung an Erfüllungs Statt annimmt.’ (The debt is discharged when the creditor accepts a performance other than the owed performance as alternative discharge.) If the object handed over as an alternative performance is defective or burdened with a third party’s rights, there may be problems. For a discussion thereof, see Medicus *Schuldrecht I* marg note 248.

²³⁹ See Medicus *Schuldrecht I* marg notes 242 and 245.

²⁴⁰ Medicus *Schuldrecht I* marg note 242, where he points out that this type of performance is only hinted at in §§ 364 ff BGB. Also see *op cit* marg note 245.

more sense when we apply it to the most common example of a *Leistung erfüllungshalber*, namely payment by means of a cheque.²⁴¹ Mere handing over of a cheque as payment will not discharge the debt in question. The creditor must do something more than accept the cheque; he must present it to a bank. If the bank honours the cheque, the debt on the cheque and the original debt will both be settled and the debtor will be freed.²⁴² If the bank does not honour the cheque, the debtor will still be obliged in terms of the cheque and the creditor can also fall back on his original claim.²⁴³

So far, we have been dealing with performance aimed at fulfilment of an existing obligation (whether or not the performance corresponds to the terms of the obligation). Now we must consider what happens when someone makes a performance in the absence of an obligation, or when a performance fails to extinguish an existent obligation.

‘Performance’ in the context of the law of enrichment: the *Leistungsbegriff*²⁴⁴

1 Definition and requirements

Within the law of enrichment, as mentioned above, the word ‘*Leistung*’²⁴⁵ has a very specific meaning. It is generally defined as the ‘conscious and purpose-directed increase of the assets of another’ (‘bewußte und zweckgerichtete Mehrung fremden Vermögens’).²⁴⁶ In other words, in this context, the concept of a *Leistung* implies not only the act of performing but also that it is conscious, directed at a particular purpose, and that it increases the patrimony of another.

²⁴¹ On cheque payments, see Chapter Three.

²⁴² Medicus *Schuldrecht I* marg note 245.

²⁴³ Medicus *Schuldrecht I* marg note 245. On the creditor’s rights and duties regarding the object which has been given to him as provisional performance, see Medicus *Schuldrecht I* marg note 246.

²⁴⁴ An excellent summary of the main rules may be found in W Stölte ‘Der Leistungsbegriff: Ein Gespenst des Bereicherungsrechts?’ 1990 *JZ* 220 at 221.

²⁴⁵ As used in § 812 BGB.

²⁴⁶ See, e.g., BGHZ 58, 184; BGH NJW 1999, 1393; Esser, *Schuldrecht* (2ed, 1960) § 189 Nr 6, 7; Lorenz (1991) 191 *AcP* 279 at 280; Medicus *Bürgerliches Recht* marg note 666; *idem* *Schuldrecht II* marg note 634; Stölte 1990 *JZ* 220 at 221.

A *Leistung* is therefore something more than the mere act of performance. This can cause terminological difficulties, particularly in English. How can one distinguish between the *Leistung*, loaded with meaning, and the act of performing itself (e.g. by transferring property, or performing a service)?²⁴⁷ The Germans do so by using the word ‘Zuwendung’ – a word that roughly means ‘giving’ or ‘handing over’ – to express the latter meaning. Similarly, how can one distinguish, in English, between the notion of ‘performance’ in the law of contract, for example, and the more expansive meaning attached to the word *Leistung* in the context of enrichment law? In this thesis, I have tried to avoid these difficulties by using the English word ‘performance’ when referring to a *Leistung* in a more general sense, and by using the German word to denote the narrower meaning given to the concept in the German law of enrichment.

Let us now consider the requirements of a *Leistung* in more detail. The requirement of awareness is fairly self-explanatory. The performing party must thus be conscious that he is increasing the property of another by his performance.²⁴⁸ Property, in this context, has a very broad meaning, including, for example, things which have only a sentimental value and even the mere possession of things; in short, it includes ‘anything’ that has been received.²⁴⁹

The requirement that has attracted the most attention is that the party who performs must do so in order to achieve a purpose.²⁵⁰ By performing, a party most often intends to fulfil an obligation arising from a legal relationship between himself and the recipient of the performance.²⁵¹ Thus, for example, a seller transfers a thing to the

²⁴⁷ I.e. what the Romans would have called a *datio* or a *factum*.

²⁴⁸ For further detail, see Medicus *Schuldrecht II* marg note 635.

²⁴⁹ Medicus *Schuldrecht II* marg note 634.

²⁵⁰ See, e.g., Medicus *Bürgerliches Recht* marg note 686. As Medicus points out (*Schuldrecht II* marg note 636), where someone hands something over, he is usually trying to achieve something by his sacrifice.

²⁵¹ See, e.g., Loewenheim *Bereicherungsrecht* 25; Larenz and Canaris *Schuldrecht II/2* 132. This situation illustrates the link between the *Leistungskondition* and the conveyance of property referred to above: see Loewenheim *op cit* 26. Where someone’s purpose is to settle a debt, the determination of this purpose is sometimes referred to as a *Tilgungsbestimmung*: see Medicus *Schuldrecht I* marg note 237 and the index under *Tilgungsbestimmung*.

purchaser in order to discharge his obligation in terms of their contract of sale.²⁵² This underlying obligation, if valid, provides the *causa* for the performance, and the obligatory legal relationship between the parties is therefore called the *Kausalverhältnis* ('causal relationship'). If the causal relationship is invalid, the performing party's performance will not achieve its purpose and there will be no *causa*. In other words, the shift of assets will have occurred without legal ground.

A performance need not only be made in order to discharge a debt (i.e. *solvendi causa*), however, in order to qualify as a *Leistung*.²⁵³ Thus, for example, someone might shift an asset to another as a donation (*donandi causa*), or to acquire a claim against him,²⁵⁴ or to induce him to behave in a particular way.²⁵⁵ As Loewenheim emphasises, this is not a closed list; a performance will qualify as a *Leistung* if made for any legal purpose.²⁵⁶ If the performing party seeks to fulfil several purposes, it is his primary purpose which is decisive.²⁵⁷

In certain cases at least, the purpose of the performing party is determined objectively,²⁵⁸ in accordance with the doctrine of the *objektivierte Empfängerhorizont*.²⁵⁹ In terms of this doctrine, certain declarations of intent (*Willenserklärungen*)²⁶⁰ are to be

²⁵² Loewenheim *Bereicherungsrecht* 25.

²⁵³ Loewenheim *Bereicherungsrecht* 26.

²⁵⁴ For example, a claim arising from *Geschäftsführung ohne Auftrag*, the German equivalent of our *negotiorum gestio*.

²⁵⁵ I.e. *Leistung causa data non secuta, ob rem*: see Loewenheim *Bereicherungsrecht* 26. For example, no contractual obligation arises from a contract of sale of land that does not comply with the necessary formalities, but the purchase might pay the purchase price in order to induce the seller to transfer the property and to allow registration thereof. For this example, see Loewenheim *Bereicherungsrecht* 26.

²⁵⁶ *Bereicherungsrecht* 26.

²⁵⁷ Medicus *Schuldrecht II* marg note 640.

²⁵⁸ *Palandt* § 133 marg note 9.

²⁵⁹ On the relevance of the *Empfängerhorizont* in cases of enrichment, see Köppensteiner and Kramer *Bereicherung* 33 ff, 36 ff, 43; Loewenheim *Bereicherungsrecht* 44. See Medicus *Bürgerliches Recht* marg note 687 for a discussion of the background.

²⁶⁰ *Palandt* § 133 marg note 9; Kropholler *BGB* § 133 marg note 4: those declarations of intent which need to be received. This category would thus include declarations made with a view to contracting. According to the *herrschende Meinung*, the doctrine of the *objektivierte Empfängerhorizont* is also used to determine whether a valid declaration of intent exists at all, where a party makes a declaration unaware that he is making a legally relevant act. (See Kropholler *BGB* § 133 marg note 4, read with § 119 marg note 7 and § 116 marg note 3) In other words, it is relevant to the law relating to error (§ 119 BGB). Those declarations of intent which

interpreted as they must have been understood by the recipient acting in good faith and taking into account common usage.²⁶¹ The law is generally concerned, not with the recipient's actual interpretation of the performing party's purpose, but with the view of a third person in the position of the recipient.²⁶² The performing party (i.e. the one who makes the *Leistung*) will accordingly be the party whom a reasonable person in the position of the recipient would regard as having performed.²⁶³ This applies unless the recipient was aware of the declaring party's actual intention, in which case the real intention will be decisive.²⁶⁴

2 Implications of the *Leistungsbegriff*

The purposive element of a *Leistung* is important in various ways. Before the modern *Leistungsbegriff* rose to prominence, the 'legal ground' referred to in § 812 BGB was understood only to be the 'causal relationship' (*Kausalverhältnis*) between the parties in terms of which the shift of assets took place.²⁶⁵ The introduction of the requirement of purpose widened the notion of a legal ground.²⁶⁶ The current view is accordingly that the legal ground lies in the fulfilment of the purpose of the performance,²⁶⁷ whether that purpose is the discharge of an obligation arising from a causal relationship or any other legal purpose.²⁶⁸

To sum up, if the purpose was achieved, there is no need to undo the

do not require receipt, e.g. wills, are treated differently, in that what is authoritative is the actual will of the declaring party: Kropholler BGB § 133 marg note 1.

²⁶¹ Palandt § 133 marg note 9; Kropholler BGB § 133 marg note 4: 'nach Treu und Glauben unter Berücksichtigung der Verkehrssitte'.

²⁶² Medicus *Bürgerliches Recht* marg note 45; Palandt § 133 marg note 9; Kropholler BGB § 133 marg note 4; BGH 36, 33 and other cases cited in Palandt *op cit*.

²⁶³ Stollte 1990 JZ 220 at 221.

²⁶⁴ Kropholler BGB § 133 marg note 3.

²⁶⁵ Loewenheim *Bereicherungsrecht* 56.

²⁶⁶ By introducing a subjective element (the intention of the performing party): Loewenheim *Bereicherungsrecht* 56. Although it should be borne in mind that this is sometimes determined objectively – see the discussion of the *objectivierte Empfängerhorizont* above.

²⁶⁷ Medicus *Schuldrecht II* marg note 639.

²⁶⁸ See Loewenheim *Bereicherungsrecht* 26 and 56 for further details. This logically raises the controversial question whether a purpose (and therefore a legal ground) may fail even where someone's purpose was to fulfil an obligation which in fact existed: see *idem* 57. Here, Loewenheim points out that a significant number of (influential) authors would regard the existence of a valid obligation as a legal ground which would therefore exclude an enrichment claim.

performance by means of the law of enrichment.²⁶⁹ If, on the other hand, the purpose was not achieved, the law of enrichment will step in and allow the performing party to reclaim his performance. Whether or not the purpose has been achieved thus determines whether the receipt was justified, and therefore whether an enrichment claim will lie.²⁷⁰

The second important implication of the *Leistungsbegriff* is that it supposedly helps to identify the parties between whom the enrichment claim will lie. Because the performing party's purpose must be directed at someone, it can be determined who the relevant parties are and it is therefore said that the requirement in terms of § 812 (1) BGB that the enrichment be 'at the expense of' the plaintiff is dispensed with in cases of *Leistungen*; it thus only applies to *Nichtleistung* ('non-performance') cases.²⁷¹ This has even been said to be one of the main functions of the *Leistungsbegriff*.²⁷²

This also implies that where something was received by way of a *Leistung*, there is no need to prove that the performing party was impoverished. For a *Leistungskondition* to lie, all that is necessary is that someone received something (*erlangt etwas*)²⁷³ through the *Leistung* of another, where the purpose of that *Leistung* was not achieved.

3 Manifestations of the *Leistungskondition*

Medicus divides *Leistungen* according to the purpose of the performing party: in the first category one finds those cases where the performing party intends to settle a debt and, in the second, those where he pursues some other purpose. Where his purpose is

²⁶⁹ Medicus *Schuldrecht II* marg note 636. For an exception, see the discussion of § 817 in the text to note 287 below.

²⁷⁰ Medicus *Schuldrecht II* marg notes 636, 639.

²⁷¹ Medicus *Schuldrecht II* marg note 731; Loewenheim *Bereicherungsrecht* 19; Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 25-26. As, said above, although De Vos apparently adopted the 'auf Kosten von' requirement of German law (see *Verrykingsaanspreklikeid* 339n) and C P Joubert (1959) 76 *SALJ* 471 at 475-6), he did not take over this distinction. Also see Medicus *Bürgerliches Recht* marg note 686: Es kommt nicht darauf an, wer durch die Leistung ein Recht verliert. (It does not depend on who has lost a right as a result of the *Leistung*, i.e. there is no need to investigate whether there was a corresponding impoverishment.) For the same idea, see Stolte 1990 *JZ* 220 at 221.

²⁷² See Loewenheim *Bereicherungsrecht* 25.

²⁷³ It should be noted that the wording does not refer to enrichment.

discharge of a debt, he could fail to achieve his purpose for various reasons. Thus the debt could not exist at all, or could lie between other parties, or it could have a different content to that envisaged. In such circumstances, his *Leistungskondiktion*²⁷⁴ would be called a *condictio indebiti*.²⁷⁵ One of the situations in which this *condictio* would be available will be of interest to South African lawyers: it can be used to reclaim a performance made in terms of a voidable obligation that has been avoided (i.e. when the contract is set aside, the *Leistung* retroactively loses its legal ground).²⁷⁶

If, on the other hand, the performing party did not achieve his purpose because a valid claim which he intended to fulfil by his performance subsequently fell away, his *Leistungskondiktion* would go under the name *condictio ob causam finitam*.²⁷⁷ This *condictio* is often used in the context of resolutive conditions,²⁷⁸ but it is not used upon cancellation of a contract for breach.²⁷⁹

A *Leistungskondiktion* would also be available in circumstances where, even though the recipient had a claim to the *Leistung*, the debtor need not have made it because he would have been entitled to raise a permanent defence against the creditor had the latter decided to enforce it.²⁸⁰ Thus, for example, if someone makes a performance to a creditor who obtained the claim to that performance without legal ground, the performing party will be able to reclaim his performance by means of a *Leistungskondiktion*.²⁸¹

²⁷⁴ In terms of § 812 (1) sent 1 BGB.

²⁷⁵ For all of this, see Medicus *Schuldrecht II* marg note 641.

²⁷⁶ See Medicus *Schuldrecht II* marg note 646.

²⁷⁷ § 812 (1) sent 2 alt 1 BGB. See Medicus *Schuldrecht II* marg note 642, where he points out that this *condictio* has a narrow range of application. It will not be available where a voidable contract has been avoided because the obligation is extinguished with retroactive effect in such cases i.e. it is as if there never was a valid obligation at all.

²⁷⁸ See Medicus *Schuldrecht II* marg note 647.

²⁷⁹ Medicus *Schuldrecht II* marg note 649. In such circumstances, a performance made in terms of the contract may be reclaimed in terms of § 346 BGB, which creates an obligation to restore such performance.

²⁸⁰ § 813 (1) sent 1; Medicus *Schuldrecht II* marg note 643. According to §§ 813 (1) sent 2 read with § 222 (2) BGB, this does not apply to the defence of prescription. The full text of § 813 BGB, with a translation may be found in Appendix A.

²⁸¹ See Medicus *Schuldrecht II* marg note 643.

On the other hand, a *Leistungskondition* will be available where the performance was aimed at a performance other than fulfilment of a debt.²⁸² Thus an enrichment action in the form of a *condictio ob rem* will be available where the performance is aimed at a particular result which does not materialise.²⁸³

Finally, the *Leistungskondition* can take on the likeness of a *condictio ob turpem vel iniustam causam*,²⁸⁴ where the recipient disobeyed a statutory prohibition or offended against good morals in accepting the performance.²⁸⁵ It should be noted that the enrichment claim will only lie where the *recipient* alone contravened the law or the *boni mores*, and that it will accordingly not be available where both parties acted illegally or immorally.²⁸⁶ This form of the *Leistungskondition* is exceptional in that it is available despite the fact that the plaintiff achieved his purpose in performing.²⁸⁷

4 The *Leistungsbegriff* and multi-party enrichment

The *Leistungsbegriff*, as portrayed thus far, probably sounds like an attractive panacea for the worst kinds of ills to which enrichment law is prone. Thus, for example, it apparently dispenses with the troublesome requirement that someone receive something 'at the expense of another'. As will become apparent in subsequent chapters of this thesis, however, it does not achieve all it seems to promise.

If only two parties are involved, it is clear who performs (*leistet*) to whom. Where three or more parties are involved, however, the legal picture becomes more complex. What happens, for example, where A transfers property to C with the intention of performing to B, where C thinks that he is the recipient of A's performance? It can also be difficult to determine who makes the performance in question. Thus, for example, if B pays C by means of a cheque drawn on bank A, who has performed? Is it

²⁸² Medicus *Schuldrecht II* marg note 644.

²⁸³ According to § 812 (1) sent 2 alt 2 BGB. Medicus (*Schuldrecht II* marg note 644) cites the following example, amongst others: payment in a cash transactions for which there is no prior obligation i.e. where the *Leistung* itself should create the legal ground for the payment.

²⁸⁴ Medicus *Schuldrecht II* marg note 645.

²⁸⁵ See the wording of § 817 sent 1 BGB.

²⁸⁶ According to § 817 sent 2 – the German equivalent of our *par delictum* rule.

²⁸⁷ See Medicus *Schuldrecht II* marg note 645 for further explanation.

B, who intends to pay C, or is it A, which transfers the money to C's bank (or hands over cash if it is a cash cheque), or is it C's bank, which debits C's bank account? What happens if someone makes a performance with the intention of simultaneously performing to two parties? The *Leistungsbegriff* does not provide easy answers to these questions.

It is thus within the context of multi-party enrichment that the *Leistungsbegriff* has met its greatest challenges, and exposed its greatest shortcomings. Just as the *Leistungsbegriff* divides the law of enrichment, it divides enrichment lawyers into two camps: those who support it, and those who are critical of it.²⁸⁸

The most influential of the *Leistungsbegriff*'s critics is Canaris. In a seminal essay, he identified many of its defects, using cases of multi-party enrichment to illustrate them.²⁸⁹ Some will be considered in subsequent chapters of this thesis. Despite his cogent criticisms, however, the *Leistungsbegriff* has proved remarkably resilient. It has a surprisingly tenacious hold on German enrichment lawyers, and still has some very influential supporters.²⁹⁰ Even the advocates of the *Leistungsbegriff*, however, would acknowledge the contribution made by Canaris. In particular, he formulated several general principles which are of great assistance in deciding whether an enrichment claim should be granted in the 'difficult' cases of multi-party enrichment.

The 'Canaris principles'

According to the first of these principles, 'the parties to an invalid "obligatory act" or

²⁸⁸ For criticism see, *inter alia*, *Münchener Kommentar/Lieb* § 812 ff and 'Zur bereicherungsrechtlichen Rückabwicklung bei der Zession' (1990) 7 *Jura* 359; Lorenz (1991) 191 *AcP* 279 at 295; Berthold Kupisch *Gesetzespositivismus im Bereicherungsrecht: Zur Leistungskondition im Drei-Personenverhältnis* (1978); Stolte 1990 *JZ* 220; Canaris (n 141) 799 ff.

²⁸⁹ Canaris (n 141) at 802.

²⁹⁰ For example, albeit to a limited extent, Medicus – see for example, his *Bürgerliches Recht* marg notes 668 ('Ein mit der Kontinuität brechender "Abschied vom Leistungsbegriff"... scheint mir erst in letzter Linie vertretbar') and 686 (but cf his comments in *Schuldrecht II* marg note 731). For a recent contribution to the debate, see Alexander Schall *Leistungskondition und 'Sonstige Kondition' auf der Grundlage des einheitlichen gesetzlichen Kondikationsprinzips* (2003), a thesis written in support of the *Leistungsbegriff* under the supervision of Canaris.

Kausalverhältnis’,²⁹¹ for example a void contract, should be able to retain any defences that they would have had against each other had that causal relationship been valid. Secondly, each party to a defective causal relationship should be protected against any defences held by the other contracting party that arise from his legal relationship with a third party. Thirdly, the risk of insolvency of one of the parties must be borne by the person who chose to contract with him, even if their contract is defective for some reason.²⁹²

1 The notion of a ‘causal relationship’²⁹³

These principles raise three issues that are significant for the rest of this thesis. The first is that the notion of a causal relationship – as discussed above – is central to Canaris’s approach. Effectively, an enrichment claim will lie between the two parties to a defective causal relationship (usually a contract).²⁹⁴ As it clearly identifies the two parties to an enrichment claim, the notion of a causal relationship also obviates the need for a requirement that the enrichment be ‘at the expense of’ the plaintiff.

The notion of a causal relationship is also interesting in that it is reminiscent of the old idea of a ‘negotium’ – still sometimes required for relief in the form of a *condictio sine causa specialis* – in that it refers to some sort of contact between the parties which is contractual in nature but which falls short of being a valid contract.²⁹⁵

²⁹¹ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 32.

²⁹² Canaris (n 141) at 802.

²⁹³ For a general definition of a causal transaction, see *Palandt* vor § 104 marg note 19 bb).

²⁹⁴ See, e.g., BGHZ 122, 46 at 51: the enrichment action is confined to ‘that legal relationship in which the mistake arose’ (‘die Rechtsbeziehung, in der ein Fehler aufgetreten ist ...’).

²⁹⁵ See, e.g., M de Villiers ‘Negotium in Roman Law’ (1928) 45 *SALJ* 223: ‘The original form of the word *negotium* was *nec otium*, the negation of inactivity, hence it was used to denote active employment.’ But ‘... *negotium* acquired a wider meaning in the case of contract as denoting that transaction itself, especially when in the making, and a better meaning may be it comprised a “reciprocal agreement of some sort.” (My emphasis). He continues: ‘Post-Roman commentators on the law also sometimes used the word *negotium* to denote an agreement amounting to a contract. Thus Huber refers to a *negotium habile ad obligationem producendam*, a contract capable of establishing an obligation (thus a *causa obligationis*), as was rightly held by DE VILLIERS, J., in the case of *Conradie v Russouw* [sic] (1919), App. Div., 314.’ Also cf Sir John G Kotze *Causa in the Roman and Roman-Dutch Law of Contract* (1922) 65 ff, particularly at 66, where he says: ‘By this he intends to convey that the convention or agreement *partakes somewhat of the nature of a contract (negotium)...*’ Dawson *Unjust Enrichment: A Comparative Analysis* (1951) 51 translates *negotium* as ‘direct dealing ... between the parties’. Referring to Julian’s refusal to grant a remedy to someone who has improved the property of

This idea will be explored in later chapters.

Bearing in mind that the most common 'causal relationship' is a contract, Canaris's focus on this relationship gives his views of German enrichment law (at least concerning triangular situations) a 'contractual' complexion.²⁹⁶ I do not mean that the claims arising in this area of law are contractual in any way; clearly their purpose is to reverse enrichment (and therefore restore the status quo)²⁹⁷ whereas contractual claims are usually aimed at achieving the promised result (i.e. changing the status quo in accordance with the wishes of the parties). I mean that, if one follows Canaris's approach, enrichment claims in triangular situations almost always rise from the shadow of a defective contract.²⁹⁸ This is not surprising as it can probably, at least partly, be attributed to the existence of abstraction principle of transfer of ownership. The abstraction principle expels the 'causal' element of a transaction from property law; it finds a home in the law of enrichment. In legal systems which follow the causal system, there would arguably be less need to give expression to this notion in enrichment law.

another, he says that '[h]is reason, the absence of any direct dealing between plaintiff and defendant, expressed a practical limitation, the kind of working rule that kept the remedy manageable though it could be breached occasionally where reasons were good.' He adds that '[t]he instances are rare indeed in which a condiction was awarded in the absence of an antecedent "giving" by the plaintiff to the defendant or else of a prior agreement between the parties whose correction or enforcement was sought.' Also see Van Zyl *Negotiorum Gestio* 11n34, where he says that the word 'continues to indicate any kind of action or activity which may give rise to an obligation.'

²⁹⁶ Cf Zimmermann (1985) 18 *CILSA* 1 at 7-8: 'Savigny emphasised that the *condictio* could lie where a shifting of assets had taken place otherwise than by transfer, i.e. where the acquirer would be enriched at the expense of the original owner either through his own act or through accidental circumstances.'... 'Instead of being quasi-contractual in nature, the *condictio* was held by him to be something like an *actio quasi negotiorum*: it served to abate a state of unlawful "habere" and took the place of the *rei vindicatio*, which had been lost because the acquirer had become owner. The true basis of all *condictiones*, Savigny said, consists in claiming back something which has come from our property.'

²⁹⁷ In this regard, see Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 at 404.

²⁹⁸ But not always. For example, someone might make a performance thinking that he is obliged to do so in terms of a statute. Although Canaris's views have been the most influential in this field, it should be pointed out that the views of other important writers do not have such a 'contractual' flavour. Thus Flume and Kupisch, for example, seem to look at the law of enrichment from a more proprietary perspective, i.e. focusing rather on the shifts in economic value etc. See, e.g., Berthold Kupisch 'Rechtspositivismus im Bereicherungsrecht' 1997 *JZ* 213; *idem* 'Der Gedanke "als ob": Zur wirtschaftlichen Betrachtungsweise bei der Anweisung, romanistisch und zivilistisch' in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds) *Rechtsgeschichte und Privatrechtsdogmatik* (2000) 431; Flume (1999) 199 *AcP* 1.

2 A normative approach to multi-party enrichment

The second issue that bears emphasising is that Canaris's approach should be seen within the context of the '*Normativierung*' of enrichment law 'whereby the underlying legal policy considerations are evaluated and weighed up against each other in order to reach a decision'.²⁹⁹ This general approach is also followed by other writers and the German courts. Thus, for example, it has been said that the law of enrichment requires an economic rather than a formally legal approach.³⁰⁰ Similarly, the courts take into account the protection of a party's reliance interest, allocation of risk and other interests of the parties.³⁰¹

It has been argued that an approach which takes underlying policies into account should be followed in the South African law of enrichment.³⁰² Visser has identified the following policy factors as having relevance for cases of multi-party enrichment: the nature of the relationships between the parties; that the 'business risks' of contracting should be borne by the contractants; that a party should not have to bear the risk of settling the same debt twice; that a party should not be able to claim payment of the same debt twice; that a contracting party 'should not be unjustifiably deprived of the right to rely on his or her contractual defences against their contracting partner'; that the law should promote the 'security of receipts'; that the law should retain the *paritas creditorum* rule'; the 'economic consequences' of granting or dismissing an enrichment claim; and the question whether enrichment claims should be subsidiary to claims

²⁹⁹ Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 38. Cf also Visser (n 2) and judicial approval of this approach per Van Zyl J in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers supra* at 951 ff.

³⁰⁰ BGHZ 105, 365 at 368-9. Also see BGHZ 36, 232 at 234; BGH WM 1983, 792 at 793.

³⁰¹ See, for example, BGHZ 105, 365; BGHZ 122, 46 where the judge says (at 51) that protection of reliance and proper allocation of risk must be taken into account because the *Leistungsbegriff* on its own does not always appear convincing: ('[Die] Gesichtspunkte des Vertrauensschutzes und der Risikoverteilung, die mitberücksichtigt werden müssen, da die Ableitung aus dem Leistungsbegriff allein nicht immer überzeugend erscheint.').

³⁰² Especially by D P Visser. See, e.g., the articles cited in notes 2, 10 (at 531 ff) and (together with Saul Miller) (2000) 117 *SALJ* 594. Regarding the role of policy and open-ended norms in other areas of our law, see, e.g., Corbett (1987) 104 *SALJ* 52. Unlike the South African law of contract, for example, which has been described as 'a seamless web of rules which possesses a determinative rationality of its own, such that answers to any disputes will be thrown up by the inexorable logic that is internal to the system itself', the 'hard edges of legal policy' in the context of our law of unjustified enrichment have not yet been 'smoothed away by the sandpaper of legal doctrine': see Alfred Cockrell 'Substance and form in the South African law of contract' (1992) 109 *SALJ* 40 at 40.

arising from a contract and the allied questions whether the plaintiff has exercised any alternative rights of recourse and whether (and why) the plaintiff's 'contractual claim against the third party is not enforceable or not worth enforcing'.³⁰³ One could also mention the more general values of consistency and coherence.

Clearly there is some overlap between Visser's list of policy factors and the factors taken into account in German law. A policy consideration underlying some of the factors mentioned in Visser's list, but not mentioned specifically, is the protection of a party's reliance interest.

3 Reliance on appearances

The third issue to be discussed in the context of Canaris's principles arises from his background in banking law. Understanding certain aspects of Canaris's treatment of three-cornered enrichment situations³⁰⁴ is facilitated by an appreciation of the *Rechtsscheintheorie*, its function within the law of negotiable instruments, and its relationship to the rules on *bona fide* receipt of ownership.³⁰⁵ This theory, developed mainly by Ernst Jacobi and Herbert Mayer,³⁰⁶ is used in the law of negotiable instruments in order to distinguish the circumstances in which a holder in good faith may or may not raise a defence against the drawee of an instrument.³⁰⁷ One of its

³⁰³ Visser (n 10) at 530 ff.

³⁰⁴ E.g. his emphasis on defences.

³⁰⁵ See A Huek and C-W Canaris *Recht der Wertpapiere* 11 ed (1977) pp 30 ff and para 19 (pp 132 ff).

³⁰⁶ *Op cit* at 31.

³⁰⁷ The possible defences can thus be divided into those which may be raised by the holder against the debtor (i.e. where the requirements of the *Rechtsscheintheorie* are met and the holder's reliance may be protected), and those which may not (due to non-compliance with the *Rechtsscheinstheorie*). Each of these categories has further subdivisions which need not be discussed here. For example, the former category includes *Gültigkeitseinwendungen* ('validity defences') and *persönliche Einwendungen* ('personal defences'): Huek and Canaris (n 305) at 137. *Gültigkeitseinwendungen* are defences which arise from a lack of validity of the claim arising from the bill of exchange in circumstances where the requirements of the *Rechtsscheintheorie* are nevertheless fulfilled: *op cit* 138. *Persönliche Einwendungen*, on the other hand, are those which result from the causal relationships which underlie the *Wechsel* (exchange): *loc cit*. The latter category of defences i.e. those which may not be raised, include *Inhaltliche/Urkundliche* (content/documentary) defences, *Zurechenbarkeit* (attributability) defences and *Unmittelbar* (direct) defences: *loc cit*. *Inhaltliche* defences are those which appear from the instrument itself e.g. where the formalities have not been complied with: *op cit* 140. *Zurechenbarkeit* defences are those which arise from a lack of attributability to the debtor e.g. where the instrument was written under duress, where there was no capacity to act, where the

advantages is that it is consistent with that part of the law of property which deals with the circumstances in which a *bona fide* recipient may acquire ownership.³⁰⁸

The theory is based on 2 principles: the *Rechtsscheinsprinzip* and the *Zurechenbarkeitsprinzip*.³⁰⁹ The first is basically a principle which protects a party's reliance on the outward appearance of compliance with the legal requirements for the validity of an instrument, by making the other party liable for it. (It could therefore be seen to approximate our law of estoppel,³¹⁰ or in the law of contract, the notion that a contract can be based on reasonable reliance on the appearance of consensus).³¹¹ The second principle states that someone can only be held liable in accordance with this appearance of compliance if its creation is attributable to him.³¹² In other words, in terms of the *Rechtsscheintheorie*, the reliance of a recipient in good faith creates liability on the part of the person to whom the creation of the apparent compliance is attributable. The requirements for the application of this theory are: the existence of apparent compliance with the legal requirements for validity;³¹³ this must be attributable to the other party;³¹⁴ and, in addition, the defect must relate to an earlier transaction.³¹⁵ For liability based on reliance to arise, one party must thus have done something to create that reliance (e.g. written a cheque or created a debit order) and the party acting in reliance must have acted *bona fide*. Finally, the defect in question must arise not from the transaction between these two parties, but from a previous transaction.

The third requirement requires some explanation. Consider the situation, for

signature was forged, where there was no *Begebungsvertrag* (the special type of transfer agreement for negotiable instruments) at all, or where there was a defect of will in terms of §§ 116 ff BGB.

³⁰⁸ § 932 BGB: The recipient will also become owner through an alienation in terms of § 929 BGB if the thing does not belong to the transferor when he, at the time at which he would receive ownership in terms of these provisions, is not in good faith. It the case of § 929 sentence 2 only applies, however, if the recipient had received possession from the transferor.

³⁰⁹ Huek and Canaris (n 305) 31.

³¹⁰ In terms of which someone who makes a representation will be estopped from denying that representation if someone reasonably relied on it to his prejudice, provided that it is reasonable to expect third party to rely on the representation.

³¹¹ *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A).

³¹² Huek and Canaris (n 305) 31.

³¹³ Huek and Canaris (n 305) 134.

³¹⁴ Huek and Canaris (n 305) 135.

³¹⁵ Huek and Canaris (n 305) 134.

example, where someone receives possession of a thing in good faith from a minor. The recipient, though *bona fide*, will not receive ownership in terms of § 932 BGB (in other words, no effect will be given to his belief in the appearance of a real agreement) because the minor has no capacity to act and is therefore not able to conclude a real agreement. This may be contrasted with the situation where Z, who is *bona fide*, receives a thing from Y, who is in fact not owner himself because of the minority of the person who purported to transfer the thing to him. In this case, as Y has the capacity to conclude a real agreement, Z will become owner in terms of § 932 BGB. By way of analogy to this case, if someone, acting *bona fide*, receives a bill of exchange directly from a minor, he will not be protected in terms of the *Rechtsscheintheorie*. If, however, the defect (the lack of capacity of a party) arises from a prior transaction, it will not exclude the application of the theory i.e the *bona fide* recipient of the bill of exchange will be protected in that the law will give effect to his *bona fide* belief in the appearance of compliance.³¹⁶

APPROACH AND METHOD

According to Zweigert and Kötz, '[t]he basic methodological principle of all comparative law is that of *functionality*.... [I]n law the only things which are comparable are those which fulfil the same function.'³¹⁷ In this thesis, I will compare the ways in which German and South African law deal with certain practical problems that arise in situations of multi-party enrichment.³¹⁸

The fact-based treatment of the German law regarding multi-party enrichment greatly facilitates a functional comparative approach. It should be borne in mind, however, that the relevant facts used for categorisation of cases are usually legal constructs (e.g. contractual or other obligations, cession, pledge, suretyship and so on). This is partly because enrichment liability is, to a large extent, determined by its legal

³¹⁶ I am extremely grateful to Sonja Meier for clarifying some aspects of this theory for me.

³¹⁷ See Zweigert and Kötz (n 113) 34.

³¹⁸ In other words, this will be a work of 'microcomparison': see Zweigert and Kötz (n 113) 5.

context. For instance, if one can be enriched by the receipt of a personal right, the content and extent of that right must be determined by reference to the branch of the law of obligations from which it arose.³¹⁹ In order for comparisons to be meaningful, the rules of enrichment law must be considered within their own legal context and not in isolation; otherwise one runs the risk that apparent differences between legal systems might be misunderstood.³²⁰ Thus a comparison of enrichment liability in different legal systems also entails a comparison of the broader legal context within which that liability arises.³²¹ This makes comparison of systems of enrichment law particularly difficult, and these difficulties are compounded when there are fundamental differences in these 'contextual rules' between the legal systems under consideration. As said above,³²² the broad similarity between the German and South African legal backdrops to enrichment law helps to focus the spotlight on any differences in the enrichment law of these two systems.

This thesis, then, will not follow the 'typical' pattern of comparative theses written in South Africa i.e. where there is an introduction and identification of the problem; then a report of the South African law on the topic; followed by a report of German law on the same topic; and finally a comparison and critical evaluation. Partly to increase its comprehensibility, and partly to increase its practical usefulness,³²³ this thesis will be divided into chapters dealing with sets of practical problems. Each chapter will begin with a comparison of the South African and German legal context within

³¹⁹ I.e. the scope of a contractual right is determined by the law of contract.

³²⁰ E.g. if X gives Y something in terms of an invalid contract, one system might grant X enrichment claim whereas another would not. To look at the law of enrichment in isolation might lead to the incorrect impression that X would have no claim at all in the second system, whereas he might actually have a claim in terms of the law of property (e.g. where that system follows a causal system of transfer of ownership).

³²¹ If, therefore, one wants to compare the German and South African enrichment law concerning a situation where A gives something to C rather than to his creditor B because he erroneously thinks that B has ceded the claim to that performance to C, one must take into account any differences between the German and South African law of cession.

³²² At p 17 ff.

³²³ This topic does not lend itself to following the traditional model. Because some of the rules are complex, and the number of factual permutations is great, it would be very difficult to retain all that is said about multi-party enrichment in Germany, and also to keep in mind the South African law on the topic all the way through the thesis until the two were compared in a final chapter, if the traditional approach were taken. It would also be impractical as it would involve much repetition and numerous cross-references.

which those problems arise. The different permutations of facts that can arise within that context will then be considered. For each of these permutations, the German law and South African law will be outlined,³²⁴ and then compared and critically evaluated.³²⁵ In the course of this analysis, suggestions for the future path of South African law will be made, and these will be brought together in the final chapter.

As said above, the main purposes of this thesis are to evaluate South African law and to provide suggestions for its reform. It is thus a work of 'national comparative law' in the sense that it only aims at assisting South African lawyers.³²⁶ It is not intended to be a thesis on German law. My approach will therefore be to focus largely on the most widely accepted opinions and the most important areas of controversy; it would be impossible, in a work of this scale, to consider every one of the multitude of minority opinions expressed on each aspect of multi-party enrichment in German law. Not only the positive law but also the policy considerations underlying specific decisions and rules will be considered.

It is tempting, when faced with a system as sophisticated as the German law of enrichment, to try force South African law into the German framework (e.g. to divide enrichment claims into *Leistungskonditionen* and *Nichtleistungskonditionen*, or to deal with it as if we, too, have a general basis for enrichment liability).³²⁷ It should be borne

³²⁴ Cf the comments of Zweigert and Kötz (n 113) at 43: 'Separate reports should be offered for each legal system or family of legal systems, and they should be objective, that is, free from any critical evaluation, though containing all significant qualifications or modifications. Whoever reads or uses a work on comparative law must be made familiar with the basic material, or he will be in no position to make the necessary comparisons, but in any case it is useful to give jurists access to legal systems hitherto unfamiliar to them. Occasionally, an unusual topic will demand a different method of treatment, for example, where the problem under scrutiny involves several different sub-questions or crops up in cases of different types: then it may be desirable to devote separate treatment to each sub-question or type of case, and provide a country report on each.'

³²⁵ See Zweigert and Kötz (n 113) 43, 44, 46-7.

³²⁶ Cf the remarks of Zweigert and Kötz (n 113) at 46, where they criticise German work on comparative law which, they say, starts 'from a particular question or legal institution in German law, proceeds to treat it comparatively, and ends, after evaluating the discoveries made, by drawing conclusions – proposals for reform, new interpretations – for German law alone.' They would prefer an 'international comparative law approach', but nothing so ambitious will be attempted here.

³²⁷ In this regard, it should be remembered that the SCA has expressed a preference for a general action that is subsidiary to the existing remedies: see *McCarthy Retail Ltd v Shortdistance*

in mind, however, that 'ultimately, law serves an eminently practical function'³²⁸ and that any analysis will have to be acceptable to a South African judge. One should therefore strive to find solutions which are consonant with our existing law,³²⁹ for 'to introduce a standard in one case which is greatly dissonant with those applied in existing rules may generate uncertainty in the law, which may dissuade judges from legislating in that way at all, since one of the objects of judicial law-making is to reduce uncertainty, not to create it.'³³⁰ In attempting to suggest guidelines for the future development of the South African law of multi-party enrichment, therefore, I shall use as points of reference those rules of South African law which can be considered as settled, and explain our law in its own terms, while at the same time being guided by the analyses of the German lawyers.

Finally, although comparative law and legal history so closely related that the best approach is to consider a particular problem from both perspectives, I have deliberately chosen not to consider the historical background to this topic in any comprehensive way.³³¹ Reference may, however, be made to historical factors that shed light on rules of modern law.³³²

Carriers CC supra at 488D.

³²⁸ Zimmermann: see the quotation in note 5 above.

³²⁹ See, e.g., the judgment of Smalberger ADCJ in *McCarthy Retail Ltd v Shortdistance Carriers CC supra* at 495H-I.

³³⁰ John Bell *Policy Arguments in Judicial Decisions* (1983) 19. C P Joubert (1959) 76 *SALJ* 471: 'Dit kom ons voor dat die skrywer hom op hierdie gebied ten onregte laat meevoer het deur die auf Kosten-vereiste van Duitse reg (at 475) en dat sy kritiek van die Hoë Raad se beslissing op 17 Julie 1707... asmede van die Suid-Afrikaanse regspraak op hierdie gebied ongegrond is. Ons het geen behoefte aan 'n Artikel 822 van die Duitse Wetboek nie. Ons *enrichment liens* ... is in hierdie opsig nie onsinnig en ten onregte nie. Die gesag waarop die skrywer hom ... beroep vir sy stelling dat 'n verrykingsaksie in die Romeins-Hollandse reg waar daar 'n tussenpersoon of tussenvermoë is nie kan slaag nie, is Duits! Die Hoë Raad het juis die teendeel beslis.'

³³¹ This is partly due to the breadth of the enquiry, and partly due to the fact that the Roman rules regarding privity of contract (which reflect their social and economic environment) make the legal contexts of modern South African and German law, on the one hand, and Roman law and the *ius commune*, on the other, so different as to create too many variables for comparison. The historical background to our law of enrichment has also been dealt with in detail in works such as De Vos *Verrykingsaanspreeklikheid*; Zimmermann *Law of Obligations*; Visser (n 14) at 374 ff.

³³² See Zweigert and Kötz (n 113) 8: '[L]egal history and comparative law are much of a muchness; views may differ on which of these twin sisters is the more comely, but there is no doubt that the legal historian must often use the comparative method and that if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history.'

STRUCTURE

Clearly, in view of the volume of literature and the plethora of opinions on multi-party enrichment in Germany, and the need to contextualise each set of problems, it would not be possible to consider in detail all of the factual constellations that have been identified in Germany. I have therefore selected for discussion those problem-areas where comparison with German law may be most useful for the development of South African law.³³³

The first factual situation to be considered (in Chapter Two) will be performance in terms of the obligation or supposed obligation of another. Thus, A pays B's debt to C in the absence of any contract with or instruction by B. Within this factual paradigm, various factual permutations will be considered. For example, what happens if A hands money to C intending to settle B's debt to C, but in fact B does not owe anything to C?

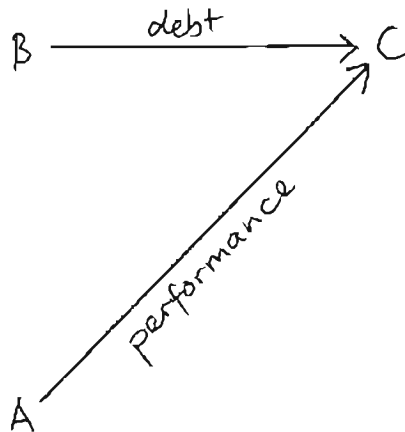
In the following chapter, I will deal with cases where A hands something³³⁴ to C in accordance with an instruction by B. For example, B owes or wishes to donate money to C. Instead of handing over the money himself, however, he instructs his debtor A to pay it on his behalf. Again, several variations of these facts will be considered. For example, what happens if B made no instruction, or he made an instruction and then withdrew it?

The next problems to be discussed (in Chapter Four) revolve around cession: A owes a performance to B, and B cedes the right to this performance to C. A thus makes the performance to the cessionary, C. The law of enrichment comes into play where one of these legal links is defective. Examples of the possible situations that can arise would be: what happens if the cession was invalid, or A did not owe anything to B?

³³³ And which have not recently been compared to German law; as the German and South African law regarding subcontractor situations and the so-called 'garage cases' has been compared by Visser (in the essay cited in note 10 and, together with Saul Miller, in (2000) 117 *SALJ* 594), these will not be considered in detail in this thesis. Also see the detailed comparison made by Sonnekus in 1996 *TSAR* 1. Cf also the factual constellations mentioned in the section on 'third party enrichment' in Detlef König's draft law of unjustified enrichment, of which a translation appears in Zimmermann (1995) 16 *Oxford Journal of Legal Studies* 403 at 425 ff.

³³⁴ Or does something for him.

It will have been noticed that the same labels have been used to identify the parties in these various situations. These labels will be used consistently throughout the thesis: in each case B owes – or purportedly owes – a performance³³⁵ to C but this performance is made by A to C. The ‘constants’ in all of these cases may be illustrated by this diagram:



What is not constant is the reason why A made that performance to C.³³⁶ This reason provides the identifying characteristic of each category of cases. Thus, for example, in the instruction cases, A performs to C because he was instructed to do so; in the cession cases, A performs to C because he thinks that B has ceded his claim to C.

The order in which I have chosen to deal with these situations has partly to do with these identifying characteristics. In order to assess the impact of an actual or supposed instruction, cession or contract, it seems sensible first to consider what happens in their absence. Therefore, although this is not typically done in Germany,³³⁷ I will begin with performances in terms of the obligation of another where they were not prompted by any instruction, cession or contract i.e. A acted *sua sponte*.

The cases where there is a – usually unilateral – instruction (B–A) follow because they are the most controversial, and therefore most discussed, cases in

³³⁵ It should be emphasised that this word is used in an untechnical sense here.

³³⁶ I.e. the reason for the ‘deflection’ of his performance from B to C.

³³⁷ An exception is Wieling *Bereicherungsrecht* 105 ff.

Germany.³³⁸ Then come the cases on cession i.e. where the reason why A performs to C instead of B is a cession (or purported cession) B–C.

It may seem that this thesis will therefore only deal with cases of *Leistungen*. This is not so. Both *Leistungs-* and *Nichtleistungskonditionen* can arise from these sets of facts. German writers would usually sift out the *Nichtleistung*-situations and discuss them elsewhere. I have decided, however, not to follow the *Leistung/Nichtleistung* distinction so closely, mainly for practical reasons: it seems more functional to consider all related practical situations together.³³⁹ For example, performances in terms of the obligation of another can fall on either side of the *Leistung-Nichtleistung* divide. If the performance in question amounts to what call *negotiorum gestio*, a German lawyer would regard it as being a *Nichtleistung* case and would therefore not consider it together with situations where one pays the supposed debt of another (i.e. where debt B – C, which A purports to settle, is invalid).

In this introductory chapter, I have tried to provide a general picture of the South African and German law of enrichment and to show how these systems generally approach cases of multi-party enrichment. In doing so, I have explained many of the basic concepts which are necessary for an understanding of the rest of this thesis. Before beginning the more detailed discussion of the practical situations mentioned above, some of these basic concepts will briefly be illustrated with the simplest case of multi-party enrichment: the so-called ‘enrichment chain’.

A PRELIMINARY EXAMPLE: ENRICHMENT CHAINS

As already mentioned,³⁴⁰ the situation envisaged here is one of consecutive *Leistungen*: for example, A transfers something to B in terms of a contract, and B transfers the same thing to C in terms of another contract. Questions of enrichment liability arise where

³³⁸ They are also often used as a model for all other triangular situations in German law; it is thus necessary to understand the way in which instruction cases are handled, in order to understand the chapters that follow. Such cases have also given rise to considerable controversy in South Africa.

³³⁹ And it is also easier for non-German lawyers to follow if all rules dealing with related practical problems are dealt with in one place.

³⁴⁰ At p 28.

either or both of the underlying contracts are void.³⁴¹ Such cases obviously only potentially give rise to enrichment liability in those legal systems which follow an abstract system of transfer of ownership, because in a causal system, the would-be transferor would retain ownership and could therefore vindicate the property rather than having to seek an enrichment claim.

The German solution in cases of this type depends on whether the transfers (or other *Leistungen*) were made gratuitously or for consideration. If both contracts are for value and if the contract between A and B is void, A will have an enrichment claim (a *Leistungskondiktion*) but only against B.³⁴² Similarly, if in such circumstances only the contract between B and C is void, B can sue C for unjustified enrichment. If both are void, it is a case of so-called *Doppelmangel*, or 'double-fault'. The old view was that A would have an enrichment claim against B, and the object of that claim was B's claim against C. In other words, he would have a *condictio condictionis*: a *Kondiktion der Kondiktion*.³⁴³ The current view is that A is confined to a claim against B, either for the object of the transfer, or for its value³⁴⁴ if it has already been transferred to C.

Every transferor, therefore, is limited to suing the person to whom he made the transfer³⁴⁵ and no direct claim would lie between A and C. The reasons given for limiting the transferor to suing the recipient of his transfer are first, that he had the opportunity to choose his contracting partner and should not be allowed to seek relief against the third party and, secondly, protection of the interests of the third party.³⁴⁶

If, on the other hand, the transfer from B to C is gratuitous, A will be able to

³⁴¹ Or, in German law, it was voidable and has been avoided.

³⁴² See, e.g., Medicus *Schuldrecht II* marg note 724.

³⁴³ See, e.g., Medicus *Schuldrecht II* marg note 726. This was contrary to the Canaris principles: after the cession A would bear the risk of the insolvency of a party whom he had not sought out (C) and C would lose any defences which arose from his relationship with B, in conflict with Canaris' principle I, or be able to raise them against A, which would conflict with Canaris's second principle. Medicus *Schuldrecht II* marg note 726.

³⁴⁴ BGB § 818 (2).

³⁴⁵ Or other *Leistung*.

³⁴⁶ Compare, in this regard, the discussion of Canaris's principles at p 45 ff above.

bring an enrichment claim directly against C.³⁴⁷ § 822 BGB expressly allows such a direct action because the interests of the third party are not deemed to be as worthy of protection in this sort of case because he did not pay for the thing which he has received.

This sort of situation also arises in South African law. It may be illustrated by the facts of *Rousseau and Others NNO v Visser and Another*,³⁴⁸ which happens to be a case of ‘Doppelmangel’. It is one of the cases which arose from the notorious ‘Kubus cult’³⁴⁹ of the mid-eighties. The brainchild of a Mr Nieuwoudt, a company called Kubus Kwekery, conducted the business of duping members of the public. In exchange for an interest-free loan of R30 to the company, the customer received an ‘activator’ and an undertaking that the company would buy back fixed amounts of ‘kubus’ per month at a predetermined price. The ‘kubus’ was an absolutely worthless³⁵⁰ dried milk culture that the customers produced by mixing the activator with milk and cheese. Practically, this meant that customers would receive a monthly return of R40 on their investment of R30, provided that they diligently sent off the mouldy dried milk. This evidently sounded like a good investment to the ‘thousands of people [who invested] millions of rands in the venture’.³⁵¹ In order to pay Peter, however, the company had to rob Paul: as with all ‘pyramid schemes’, it depended on the generation of new ‘sales’³⁵² of the activator in order to finance the repurchase of the dried product.³⁵³ Eventually, inevitably, the scheme collapsed and the company was liquidated.

The two main questions which arose for decision were whether the customers were entitled to reclaim money paid to the company³⁵⁴ and whether the company’s liquidators were entitled to claim profits made by certain customers (the defendants).³⁵⁵

³⁴⁷ BGB § 822. See, e.g., Zimmermann and Du Plessis [1994] *Restitution Law Review* 14 at 32; Loewenheim *Bereicherungsrecht* 164.

³⁴⁸ 1989 (2) SA 239 (C).

³⁴⁹ See the judgment of Munnik JP at 293B.

³⁵⁰ 300F-G: ‘[T]he so-called dried product had no commercial value whatsoever.... Even one optimist who took a load for pig food did not return.’

³⁵¹ 293C.

³⁵² The judge refers to the transaction in question sometimes as a loan and sometimes as a sale.

³⁵³ Which was ground up with the envelopes in which it arrived, and packaged and resold as activator.

³⁵⁴ 301D.

³⁵⁵ 306 ff.

In answer to the first question, the court held that the scheme in question was illegal,³⁵⁶ the parties were not in *pari delicto*,³⁵⁷ but that even if one assumed that they were,³⁵⁸ justice and public policy³⁵⁹ would demand that the customers be allowed to bring claims against the company based on the *condictio ob turpem vel iniustam causam*.³⁶⁰ The judge held that the second question would have to be answered in the negative because the amounts in question did not constitute dispositions without value,³⁶¹ as required by the Insolvency Act.³⁶²

If we analyse the facts, we can see that there was clearly an enrichment chain: A paid R30 to B, who used this to pay C. As both transactions were void for illegality,³⁶³ B was unjustifiably enriched at A's expense and C, who gave nothing of value in exchange for what he received, was enriched at B's expense. This can be distinguished from the 'triangular relationships' in that A did not give anything directly to C; at least some of his money certainly ended up in C's pocket, but it went via B, i.e. the performance did not leapfrog B. In effect, the court's decision was that the unfortunate customers (A) could sue the company (in liquidation – B), and not the fortunate customers (C). B could, in theory, bring an enrichment claim against C, but was prevented from doing so by the wording of the Insolvency Act. In other words, as in German law, A cannot sue C directly. A must sue B who must sue C: the enrichment claims have to follow the links of the chain.

The question that then arises is whether South African law and German law also follow this pattern (A–B–C) where A transfers something³⁶⁴ directly to C. In such circumstances,³⁶⁵ who will have an enrichment claim against whom?

³⁵⁶ As it was a lottery in terms of the Gambling Act 51 of 1965: see the judgment at 300H.

³⁵⁷ At 304H.

³⁵⁸ At 305D.

³⁵⁹ See 304H-I and 305-306.

³⁶⁰ At 304I.

³⁶¹ 307 ff.

³⁶² Act 24 of 1936: s 26.

³⁶³ See the judgment at 308 B-C, where the judge, citing *Estate Jager v Whittaker and Another* 1944 AD 246, holds that that the transactions in question here were 'illegal contract[s] which [give] rise to no obligations at all'.

³⁶⁴ Or does something (i.e. makes a *factum*).

³⁶⁵ Assuming that one or more of the contractual or other legal links are defective.

CHAPTER TWO

UNJUSTIFIED ENRICHMENT IN THE CONTEXT OF UNAUTHORISED PERFORMANCE IN TERMS OF THE OBLIGATION¹ OF ANOTHER

INTRODUCTION

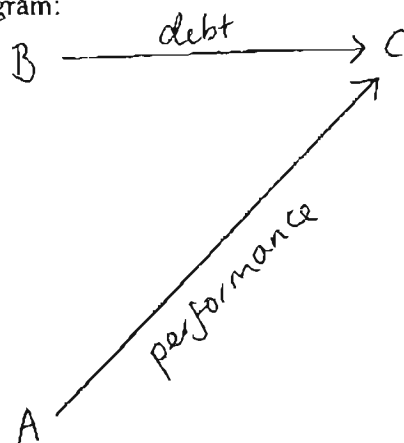
Assuming that B owes a performance to C, I (a third party) could perform in terms of that obligation for various reasons. These could relate to my legal relationship to B. I could, for example, be B's agent or he could have given me a mandate to perform to C on his behalf. Or I could be B's debtor and for convenience he has asked me to perform to his creditor, C, to obviate the need for two performances: that is, from me to B and from B to C.² For example, if I owe my absent landlord R1 000 in terms of our contract of lease, and he owes my neighbour R1 000 in terms of a contract of sale, my landlord might instruct me to give the money directly to my neighbour, thus extinguishing both debts. Or I could be obliged to make a performance to C in terms of a sub-contract between myself and B, where the main contract exists between B and C. Thus I might be a plumber who is obliged to install the plumbing in a house which a builder (B) has contracted to build for the owner of the land (C). Alternatively, I could pay C an amount equivalent to B's debt because I have agreed (with C) to stand surety for B vis-à-vis C. On the other hand, in juxtaposition to all these examples, I could have paid the debt without any prompting from B at all, without his knowledge or acquiescence, or even where he has expressly forbidden me to do so.

Each of these situations is governed by different rules, reflecting the differing

¹ Or supposed obligation.

² See, by way of analogy, the facts of *Resnik v Lekhetsoa* 1950 (3) SA 263 (T): K sold his general store to L. The purchase price was the amount owed by K to his creditors. L paid two of the creditors directly. (In this case, it was apparently a term of the contract of sale between K and L that L perform to the creditors).

policies and values underlying the allocation of liability in that context. In this chapter, we will be dealing with the last situation, in other words, where I am neither legally obliged nor have I been instructed to pay B's debt to C, but I do so nevertheless. I could pay B's debt either knowingly (i.e. aware that I am not obliged to do so), or in error.³ The factual situation may be represented by the following diagram:



I might be prompted to make the performance owed by B to C, despite knowing that I do not owe it, by various considerations. I could, for example, pay the debt on the grounds of altruism, friendship or family ties.⁴ A kindly aunt, hearing that her nephew is unable to pay his university fees, might thus pay them for him in a fit of generosity.⁵ Or I could make the performance in order to gain some sort of

³ For example, I think that I am performing in terms of my own (non-existent) debt to B or C, or I erroneously think that B owes a performance to C, when he does not: see p 149 ff below.

⁴ This might seem rather unlikely, or at least rare, today (see, for example, Medicus *Bürgerliches Recht* marg note 685; Josef Esser and Hans-Leo Weyers *Schuldrecht Band II Besonderer Teil Teilband 2* 8 ed (2000) 59: 'Praktisch nicht sehr wichtig') but in Roman times, it might have happened more commonly due to the expansive nature of the Roman *amicitia* (on this, see Fritz Schulz *Principles of Roman Law* (1936) at 233 ff). It was expected that one should undertake such things on behalf of one's friends, and such altruism (in this limited sense) was, at least amongst the upper classes (see Schulz *op cit* 233), a norm rather than, as today, at least in a Western context, merely a salutary exception (cf Niall R and Deon van Zyl 'Unauthorized management of affairs (*negotiorum gestio*)' in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 366 at 372, where they compare *negotiorum gestio* with the African concept of *ubuntu*. The Roman attitude to *amicitia* explains many aspects of Roman law, such as the relative unimportance of labour contracts compared to 'mandate and *negotiorum gestio* [which] belonged to the most important legal institutions ...' (Schulz *op cit* 236) and the importance of personal rather than real security (Schulz *op cit* 237). See *Reliance Agencies (Pty) Ltd v Patel* 1946 CPD 463 (husband paying debts owed by wife's business) for a modern example; and also see Van Zyl *Negotiorum Gestio* 36. In most such situations, A would make the performance to C as a donation to B. In Roman law, it was assumed that if A and B were family members, the performance would amount to a donation: see, e.g., Van Zyl *Negotiorum Gestio* 36; Zimmermann *Law of Obligations* 439n52.

⁵ For analogous examples (but where A owed B a duty of support i.e. there was a legal obligation between A and B) see *Reliance Agencies (Pty) Ltd v Patel supra* (husband); Pauw

advantage or benefit for myself.⁶ For example, I might pay my debtor's debt to prevent his business being liquidated, so as to increase my chances of being paid what he owes me. I might even perform in terms of another's obligation in contravention of the express wishes of the debtor.⁷ I could thus settle my struggling sister's debts, despite her protesting that she wishes to extricate herself from her financial difficulties by her own efforts.

Then again, I could perform in terms of someone else's obligation in error.⁸ For instance, I might purport to pay someone's debt, not realising that it has already been settled or that it never existed at all. Thus, for example, when the kindly aunt pays the impecunious student's fees, they had already been paid by an equally kindly uncle. Alternatively, I make the performance because I think that I am bound to do so in terms of a (non-existent) contract between myself and B (such as agency, mandate, or insurance),⁹ or between myself and C (such as suretyship),¹⁰ or as a result of a supposed cession¹¹ by my creditor (B) to C.¹²

As already mentioned, the focus of this chapter will fall on those situations where A is under no legal obligation at all, whether actual or supposed, to perform B's obligation to C. The rules governing each of these relationships (i.e. between

Observationes Tumultuariæ Novæ No 12 (mother), cited in *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 438C-D.

⁶ See, for example, *Shaw v Kirby* 1924 GWL 33 (where a prospective partner paid the debts of the partnership 'in consideration of benefits which, by these payments, he expected would accrue to himself when the partnership agreement should take effect' (at 36)); *Van Staden v Pretorius* 1965 (1) SA 853 (T) (where the purchaser of a piece of land, who had been in possession of the property for some time and had made various improvements, but who had not yet received title, paid the seller's debts in order to prevent a threatened sale in execution of the land); *Odendaal v Van Oudtshoorn supra* (where the purchaser of a restaurant paid what was owed by the seller to a supplier, as the supplier otherwise refused to supply certain goods to the purchaser).

⁷ See, for example, *Standard Bank Financial Services v Taylam (Pty) Ltd* 1979 (2) SA 383 (C). As to whether the case really concerned performance of the obligation of another, or performance of one's own obligation, see the discussion of this case at p 124 ff below, and, for further details, see Chapter Three. Also cf Medicus's example of A settling B's debt to C in order to make B his (A's) own debtor. see Medicus *Bürgerliches Recht* marg note 952, and p 100 below.

⁸ Again, in the absence of an obligation to do so. See, e.g., Medicus *Schuldrecht II* marg note 611.

⁹ See Chapter Three below.

¹⁰ Or some other contract e.g. I receive an electricity account and, thinking that it is mine because I have not yet received my monthly account, I mistakenly pay the amount in fact owed by someone else.

¹¹ See Chapter Four below.

¹² The examples mentioned in this sentence represent some of the categories that have 'crystallised' in German law, and some will be dealt with in subsequent chapters.

myself (A) and B, B and C, and A and C) will now be examined in turn. A composite picture of the allocation of liability, whether deriving from a contract, from unjustified enrichment or from any other source, will thus be outlined. Only once there is clarity about the pattern of liability in the absence of an actual or purported obligation¹³ on the part of A to perform to C, can the effect of the existence of such an obligation (or purported obligation) be evaluated.¹⁴ This will be considered in subsequent chapters.

THE RELATIONSHIP BETWEEN A AND C

For the purposes of this chapter, we will not only assume that there is no actual or supposed contractual relationship¹⁵ between A and B, as said above, but also that there is no actual or supposed contractual relationship¹⁶ between A and C. All that happens is that A either gives to or does something for C. In other words, between A and C there is either a *datio*¹⁷ or a *factum*. A terminological problem arises in this regard. The shortest way to express this in English is to say that A has 'performed' to C. The problem is that this is the word generally used to translate the German verb 'leisten' and, as was explained in the previous chapter, this term carries with it all the baggage of the 'Leistungsbegriff'.¹⁸ The Germans avoid this difficulty by using the verb 'zuwenden' (the corresponding noun being 'Zuwendung') instead. This can be loosely translated as 'to hand over', and is not a term of art. Continually speaking of 'A's handing over' would be very clumsy in English, however, and I have accordingly generally tried to use the words 'perform' or 'performance' to refer to this 'handing over' and either to use the German word 'Leistung' or to indicate where the English words have been used in this technical sense by enclosing them in inverted commas.

¹³ Whether vis-à-vis B or C.

¹⁴ It should be pointed out that this is, however, not the approach of most German writers, who generally begin their discussion of so-called 'three-cornered enrichment' with the *Anweisung* as they use this is the model for all other such cases.

¹⁵ Or other obligatory relationship.

¹⁶ Such as suretyship, for example.

¹⁷ In a literal sense, i.e. there is delivery, or a transfer of ownership (cf the expanded notion of *datio* in *Phillips v Hughes*, *Hughes v Maphumulo* 1979 (1) SA 225 (N) and *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A)).

¹⁸ See Chapter One above at p 38 ff.

THE RELATIONSHIP BETWEEN B AND C¹⁹

Assuming that B owes a performance to C, the first question that arises is: what is the effect of a performance by a third party on the obligation between the debtor and creditor? In other words, will performance by a third party (A) constitute performance in terms of (i.e. 'fulfil') the debtor's obligation and thus extinguish the debt? The answer to this question is often crucial in determining enrichment liability.²⁰ For example, if A's performance to C extinguishes the debt owed by B to C, C will not be enriched, as he will have merely received a performance to which he is entitled. To put it differently, he will have acquired something but at the same time he will have lost the claim which he would otherwise have had against B. B, on the other hand, will arguably be enriched in such circumstances, as he will have lost a liability. If, however, the debt is *not* extinguished by A's performance, C (and not B) will be the enriched party because he will retain his original claim against B and will have received an additional performance. Similarly, if A performs to C, thinking that he is performing in terms of B's obligation to C, where B in fact owes nothing to C, C will also be enriched.

The answer given by both²¹ German²² and South African²³ law to the above

¹⁹ In German terms, the 'Valutaverhältnis', or 'value relationship'.

²⁰ In South African law, at least. It is not always decisive in German law, however, as § 812 BGB has been interpreted as merely requiring that the defendant in an enrichment claim (a *Leistungskondition*) has 'erlangt etwas' (i.e. 'received something'), and not necessarily that his net financial position has improved. See Chapter One at p 42 in this regard.

²¹ The similarity of the South African and German law in this regard is not surprising, since the rule has its roots in Roman law (see Zimmermann *Law of Obligations* 3, particularly n10, and 752). These roots are very deeply embedded; they are entangled with the very origins of the concept of an obligation as a *vinculum iuris*, a legal bond. Even before the drafting of the Twelve Tables, if someone committed a wrong, the victim could be prevented from exercising his right of vengeance by the payment of a sum of money – or, originally, cattle – by the wrongdoer himself, or by a third party: Zimmermann *Law of Obligations* 3. In other words, 'a debtor, liable for execution on his person, could be redeemed by third parties': Zimmermann *Law of Obligations* 3n10. Also see Max Kaser *Roman Private Law* 3 ed (1980) (*Römisches Privatrecht* 10 ed, translated by Rolf Dannenbring) at 261. This idea finds expression in, for example, Romans 2:21 and also in aspects of the modern law of bail. In this regard, it is interesting to note that German and Afrikaans use the same words for suretyship and bail: 'Bürgschaft' and 'borg', respectively.

²² § 267 of the General Part of the BGB: '[Leistung durch Dritte] (1) Hat der Schuldner nicht in Person zu leisten, so kann auch ein Dritter die Leistung bewirken. Die Einwilligung des Schuldners ist nicht erforderlich. (2) Der Gläubiger kann die Leistung ablehnen, wenn der Schuldner widerspricht' ('[Performance by third parties] (1) If a debtor does not have to perform in person, a third party may also make performance. The approval of the debtor is not necessary. (2) The creditor can refuse the performance if the debtor objects.' (translation taken from Ian S Forrester, Simon L Goren and Hans-Michael Ilgen *The German Civil Code*

question is that, provided that personal performance of the debtor is unnecessary,²⁴ a third party²⁵ may perform in his stead, even if he has neither agreed²⁶ nor been instructed²⁷ to do so, and this performance will indeed extinguish the obligation.²⁸ The rationale for this rule is that the creditor is usually interested in receiving

(1975)).

²³ See, generally, De Wet and Van Wyk *Kontraktereg* 260 ff; D J Joubert *General Principles of the Law of Contract* (1987) 275; Lubbe and Murray *Contract* 704 ff; Van der Merwe *et al Contract* 492 ff; Christie *Contract* 471-2; Hutchison (ed) *Wille's Principles* 471.

²⁴ Either due to the express terms of the contract, or the surrounding circumstances: Christie *Contract* 471. The debtor must therefore have no special attributes which make personal performance necessary. Examples of situations where personal performance would be necessary: contracts of employment or mandate (*Palandt* § 267 marg note 1) or a contract to paint a portrait (Christie *Contract* 471) or to sing a song (De Wet and Van Wyk *Kontraktereg* 261, where the authors point out that the rule regarding *delectus personae* is merely a manifestation of the general rule that obligations should be performed by the debtor, and the rule allowing performance by a third party is the exception). See Wessels *Contract* paras 2129-30; *Bousfield v The Divisional Council of Stutterheim* (1902) 19 SC 64 at 70; *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437; *Pienaar v Boland Bank and Another* 1986 (4) SA 102 (O) at 110; De Wet and Van Wyk *Kontraktereg* 4 ed (1978) 234 (who point out that in such a case a performance tendered by a third party will not amount to the promised performance, and see their 5 ed at 262); Joubert (n 23) 275; Van der Merwe *et al Contract* 492; Hutchison (ed) *Wille's Principles* 471. On the German law in this regard, see Medicus *Schuldrecht I* marg note 139 ff.

²⁵ I.e. someone who is 'neither an agent (*Vertreter*), nor an ancillary performer (*Erfüllungsgehilfe*), nor someone who is fulfilling his own obligation (e.g. a surety or a co-debtor)': Kropholler *BGB* § 267 marg note 1. Also see *Palandt* § 267 marg note 2. An *Erfüllungsgehilfe* is someone who performs on behalf of a contracting party, without being his agent. Thus, for example, a passenger may conclude a contract with the proprietor of a taxi company, but it does not matter if the proprietor himself does not drive the taxi that conveys the passenger: see Medicus *Schuldrecht I* marg notes 139 and 318.

²⁶ For example, in terms of a contract of mandate (see *Odendaal v Van Oudshoorn supra* at 437A, *obiter*) or agency. Neither system requires consent by the debtor.

²⁷ As, for example, in the 'Anweisung' cases: see Chapter Three.

²⁸ § 267 BGB; Medicus *Schuldrecht I* marg note 140. See Wessels *Contract* para 2130; *Union Bank v Beyers*; *Union Bank v Du Toit* (1884) 3 SC 89; *Bousfield v The Divisional Council of Stutterheim supra* at 70; *Rolfes, Nebel & Co v Zweigenhaft* 1903 TS 185 at 195; *Estate Thomas v Kerr & Another* (1903) 20 SC 354 at 367; *Rosler v Kemsley Millbourn Acceptance Corporation (Pty) Ltd* 1931 NPD 335 at 344-5; *Reliance Agencies (Pty) Ltd v Patel supra* 1946 CPD 463; *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) at 458; *Jones & Druker NNO & Another v Durban City Council & Another* 1964 (2) SA 354 (D) at 371; *Froman v Robertson* 1971 (1) SA 115 (A) at 124; *Shaw v Burger* 1994 (2) SA 529 (C); *APA Network Consultants (Pty) Ltd v Absa Bank Ltd* 1996 (1) SA 1159 (W) at 1166; *Pienaar v Boland Bank and Another supra* (see the judgment at 110G-H: 'The legal position is that if a debt is owed by a debtor to a creditor, then the payment by a stranger of such debt or an offer of payment by a stranger of such debt which is made for and on behalf of, and in respect of, the debtor's debt constitutes payment or tender, as the case may be, as effectually as if it were made by the debtor himself.' The judgment of the AD which overturned this decision did so on other grounds – see *Boland Bank Ltd v Pienaar and Another* 1988 (3) SA 618 (A)). Also see Joubert (n 23) 275; Van der Merwe *et al Contract* 492; Hutchison (ed) *Wille's Principles* 471; Lubbe and Murray *Contract* 705-6. In South African law, an apparent exception is found in the law of suretyship: unless agreed otherwise, the payment of a surety extinguishes only the surety's own (accessory) obligation, and not the principal debt: see Hutchison (ed) *Wille's Principles* 616. A further exception is apparently made in cases where the third party is a bank which honours the cheque of its customer: see *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A), and the detailed discussion in Chapter Three.

performance and not in the identity of the performing party.²⁹

In order for the obligation to be extinguished, South African law requires that the 'third party ... [make it] clear that he is performing in the name and on behalf of the debtor'.³⁰ Some authorities also require that the third party should make the performance with the intention of discharging the debtor's obligation.³¹ While this seems unproblematic, and even obvious, at first sight, closer examination reveals certain difficulties. These difficulties flow from the possibility that the third party's communication to the creditor might not reflect his true intention. In other words, his (objective) declaration might differ from his (subjective) intention. In the case of contradiction, which will be effective? Will the debt be extinguished if the third party clearly and unambiguously states that he is performing for the debtor's account, even if he intends otherwise? For example, the postman puts my telephone account into my neighbour's postbox. My neighbour does not notice the error, but just glances at the total amount outstanding and hands the account together with an appropriate amount of cash to a cashier at Telkom's local branch, and the payment is reflected against my account, rather than my neighbour's. Will the payment extinguish my obligation to Telkom or not?

Using a subjective approach, focusing on the intention of the third party, would have certain advantages. First of all, it would be consistent with our courts'

²⁹ *Palandt* § 267 marg note 1; Zimmermann *Law of Obligations* 752.

³⁰ See Hutchison (ed) *Wille's Principles* 471; Christie *Contract* 471, who adds that if the third party does not do so, the creditor will be entitled to reject the performance. See *Bousfield v Divisional Council of Stutterheim* *supra* at 71 ('It is necessary ... that the tender made by a perfect stranger should be made in the name of the debtor....'); *Estate Thomas v Kerr & Another* *supra* at 367 (*obiter*); *Landers v Vogel* (1906) 27 NLR 458 at 461 (*obiter*); *Rossler v Kemsley Millbourn Acceptance Corporation* *supra* at 345; *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1938 WLD 167; *Reliance Agencies (Pty) Ltd v Patel* *supra* at 473; *Jones & Druker NNO & Another v Durban City Council & Another* *supra* at 371; *Commissioner for Inland Revenue v Visser* *supra* at 457-8; *Froman v Robertson* *supra* at 124-5, 126-7 (at 124H: '[I]n order to have this legal effect, the payment must be made in the name of the real debtor and in his discharge.'). *Pienaar v Boland Bank* *supra* at 110F-J; *Info Plus v Scheelke* 1998 (3) SA 184 (SCA).

³¹ De Wet and Van Wyk *Kontraktereg* 260; Joubert (n 23) (implied) 275; Lubbe and Murray *Contract* 705; Van der Merwe *et al Contract* 492; Louis F Van Huyssteen, Schalk W J Van der Merwe and Catherine J Maxwell *International Encyclopaedia of Laws: South Africa* 2 ed (2003) para 356. Implied, but not stated expressly, in *Bousfield v The Divisional Council of Stutterheim* *supra*; *Rolfes, Nebel & Co v Zweigenhaft* *supra* at 195; *Estate Thomas v Kerr & Another* *supra* at 367; *Reliance Agencies (Pty) Ltd v Patel* *supra* at 473; *Froman v Robertson* *supra* at 124-5; *Rossler v Kemsley Millbourn Acceptance Corporation (Pty) Ltd* *supra* at 344-5; *Commissioner for Inland Revenue v Visser* *supra* at 458; *Jones & Druker NNO & Another v Durban City Council & Another* *supra* at 371; *Pienaar v Boland Bank & Another* *supra* at 110.

basically subjective approach to contractual liability in general³² and to performance of contractual obligations in particular.³³ Secondly, it seems more sophisticated than a strictly objective approach that ignores the performing party's true intention. Thus, for example, it would enable a third party to retain his right of action against the creditor rather than acquiring one against the debtor, if he so wishes. This may be illustrated by the following example: C runs a restaurant and his supplier B does not deliver the day's supplies. Another supplier, A, might make the performance in order to help C out of his difficulties, or to assist B (who does not want to breach his obligations and upset a good customer), or possibly to gain a new customer himself. Being of the view that C is more creditworthy than B, however, A may intend that this performance *not* extinguish B's debt, so that he (A) will have a right of action against C rather than B. This would be impossible if we followed a purely objective approach. Similarly, A might perform in terms of B's debt to C, in order to claim transfer of C's contractual right against B.³⁴ Again, a purely objective approach would not allow the parties to achieve this result.

On the other hand, commercial certainty demands that the creditor know whose account to credit. Requiring proof of intention alone does not meet this need; if A, in paying, intends to settle B's debt to C but does not communicate this intention to C, C may not know on whose account the performance was made. Secondly, it seems impractical to require proof of intention as well as an indication on whose behalf the performance was made. Apart from the general difficulty in proving a subjective state of mind, it should be borne in mind that the effect of A's performance on B's obligation would, more often than not, be at issue in disputes to which A would not be a party. Thus it would usually be the creditor (e.g. in a claim

³² See, for example, *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A).

³³ It is clear that where the debtor himself performs, he must intend not only to make the performance in question but also to extinguish the obligation: see Van der Merwe *et al Contract* 487, and the authorities cited there. In other words, the parties must conclude a 'debt-extinguishing agreement', and performance thus entails a bilateral legal act: see, e.g., De Wet and Van Wyk *Kontraktereg* 263; Joubert (n 23) 274; *Saambou-Nasionale Bouvereniging v Friedman supra*. This was recently confirmed by the Supreme Court of Appeal in *Vereins-und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA). Cf the discussion of 'performance' in Chapter One at p 31 ff, where it was pointed out that German law has abandoned this bilateral approach. Also see J E du Plessis 'Die Regsaard van Prestasie' (2002) 65 *THRHR* 59.

³⁴ See Van Huyssteen *et al* (n 31) para 356: 'Discharge of the debtor will result only when the third party has a specific intention to that effect, and does not occur when the third party intends, for example, merely to perform to the creditor in order to obtain transfer of his claim against the debtor or to fulfil his duty as surety.'

for specific performance) or the debtor (defending such an action) who would have to prove the intention of the third party. The only circumstances in which a third party who performs another's obligation (or supposed obligation) without authorisation would be directly involved in litigation would be where he himself seeks recourse on the basis of unjustified enrichment.³⁵ That our law indeed often disregards the actual intention of the performing party in such circumstances is illustrated by the law of suretyship; if a surety were to pay another's creditor in terms of a contract of suretyship, he would, if asked, probably say that he thereby intended to fulfil the debtor's obligation. The general rule,³⁶ however, is that such performance will not extinguish the debtor's debt, regardless of the surety's intention at the time of performance.³⁷ Finally, this (purely subjective) point of view is not supported by authority. The cases cited by the relevant authors merely state that the third party must perform in the name of the debtor or on his behalf. While this may be seen as implying that he should have so intended, intention is only expressly mentioned in *Union Bank v Beyers*; *Union Bank v Du Toit*.³⁸ It is noteworthy that, of the three judgments in this early case, it is only the one which does not require intention³⁹ that is later cited with approval in subsequent cases. In fact, some of the difficulties caused by requiring proof of intention are well illustrated by the rather convoluted reasoning employed by the two judges whose views have since been ignored.⁴⁰

For these reasons, it is submitted that preference should be given to the formulation quoted above,⁴¹ and that proof of subjective intention should not generally be required.⁴² The third party's true intention should, however, not be

³⁵ If, for example, A performed to C by mistake, indicating that he was performing in the name of B, and the debt were extinguished, he would have to sue B. If, on the other hand, the obligation were not terminated by the performance in question, then A would have to sue C for enrichment.

³⁶ The parties could agree otherwise in the original deed of suretyship. See, for example, the facts of *Fircone Investments (Pty) Ltd v Bank of Lisbon and South Africa and Another* 1982 (3) SA 700 (T).

³⁷ See Van Huyssteen *et al* (n 31) para 356. Possible justifications for this rule are that the surety is to be afforded a stronger (i.e. contractual) right against B than he would have if he were forced to rely on enrichment liability, and that the surety is himself bound to C (i.e. he performs in terms of his own obligation to C, and C thus retains a right against B).

³⁸ *Supra*.

³⁹ That of De Villiers CJ.

⁴⁰ Viz those of Dwyers and Smith JJ.

⁴¹ At p 67 (text to note 30).

⁴² A case which can be interpreted as one where a third party extinguished the debt of another without intending to do so is *Commissioner for Inland Revenue v Visser supra*, where

completely disregarded. A possible means of accommodating his interests without jeopardising commercial certainty would be to state the rule as follows: if the third party indicated that he was performing in the name and on behalf of the debtor, the debt will be presumed to have been extinguished but this presumption could be rebutted by the third party if he could adduce proof of a contrary intention.⁴³

This would be similar, in result, to the approach followed in German law.⁴⁴ In terms of German law, the third party must perform with the intention of settling the debtor's debt.⁴⁵ But this intention is often determined objectively.⁴⁶ In other words, regard is had, not to the actual intention of the third party, but rather to the creditor's impression of this intention gauged by his conduct.⁴⁷

Some South African authorities go even further, and suggest that the performance must not only be made with the intention of settling the debtor's obligation, but also for the *benefit* of the debtor.⁴⁸ An investigation of the sources

Visser's cheque in favour of the Commissioner for Inland Revenue was used by Visser's bookkeeper to pay a debt owed by another to the Commissioner. Thus Visser arguably paid the debt of another (via his bank and his bookkeeper) without intending to do so. This case will be discussed further in Chapter Three below. Also see *Standard Bank of SA Ltd v Nair* 2000 (1) SA 998 (D) but cf *Info Plus v Scheelke supra*.

⁴³ Or, drawing inspiration from the law regarding the basis of a contract, we could give effect to the creditor's belief or reliance i.e. what would be decisive is not what the third party intended, but what the recipient thought he intended. The law would have to require the creditor to prove that his reliance was reasonable in the circumstances, otherwise the balance would be weighted too heavily in his favour.

⁴⁴ See Chapter One at p 31 ff above regarding performance in general.

⁴⁵ *Palandt* § 267 marg note 4. *Medicus Schuldrecht I* marg note 140: 'der Dritte {muß} bei seiner Leistung auf die Verbindlichkeit des Schuldners Bezug nehmen, also erkennbar für diesen leisten wollen.' ('In making performance, the third party must refer to the obligation of the debtor and therefore recognisably intend to perform for him.')

⁴⁶ '[D]er objektive Erklärungswert seines Verhaltens': Kropholler *BGB* § 267 marg note 2. Cf the explanation of the doctrine of the *objektivierte Empfängerhorizont* in Chapter One at p 40 ff above. This applies unless the recipient was aware of the performing party's actual intention, in which case the actual intention would be decisive. In this regard, also see Alexander Schall *Leistungskondition und 'Sonstige Kondition' auf der Grundlage des einheitlichen gesetzlichen Kondiktionsprinzips* (2003).

⁴⁷ *Palandt* § 267 marg note 4: 'Dabei kommt es nicht auf den inneren Willen des Dritten, sondern darauf an, wie der Gläubiger sein Verhalten verstehen durfte' ('In this regard, it does not depend upon the inner will of the third party, but upon how the creditor may have understood his behaviour'); BGHZ 40, 276; BGHZ 72, 248.

⁴⁸ See, e.g. *Reliance Agencies (Pty) Ltd v Patel supra* at 473: 'It must, however, be quite clear that the third party makes the payment for the benefit of the debtor' (per Sutton J, quoting Wessels *Contract* para 2134, who in turn cites Van Leeuwen); Lubbe and Murray *Contract* 705: 'it must be made not merely for the benefit of the debtor but with the intention of discharging him'; Van der Merwe *et al Contract* 492: 'the third party should perform not merely for the benefit of the debtor but with the specific intention of discharging him'. On the difficulties of determining the meaning of 'benefit', see, e.g. *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A) at 14.

relied upon for this proposition by the modern writers indicates, however, that what is really meant is again that the performance be made for the debtor's account.⁴⁹ If it were indeed required that the debtor benefit by the performance,⁵⁰ this would have an impact on the scope of enrichment liability, particularly in cases where the third party has acted *sui lucri causa*. That benefit of the debtor is not required is shown by cases such as *Odendaal v Van Oudtshoorn*⁵¹ where the judge expressly states that the third party made the payment purely for his own benefit,⁵² but at the same time assumes that the debt was nevertheless extinguished.⁵³

In South African law, the debtor's consent⁵⁴ and even knowledge⁵⁵ is unnecessary and the debt will be extinguished even if it is paid against the express prohibition of the debtor.⁵⁶ In at least one decision, it has even been held that the

⁴⁹ It is also submitted that the idea that the debtor be benefited by the performance should also be rejected because it is unclear what exactly is meant by 'benefit' in this regard. Should the performance objectively be for the benefit of the debtor, or should the third party merely intend to benefit him? If A pays B's debt with the intention of benefiting him, but because the debt is about to prescribe or B is already insolvent, B derives no real benefit from the payment, would the debt nevertheless be extinguished?

⁵⁰ I.e. beyond the extinction of the debt. (Because this may be seen as not being a benefit at all when the overall position is considered: the debt and the claim cancel each other out, so the creditor's net financial position remains the same. Of course, in certain practical situations, settlement of a debt might be more valuable to the creditor: e.g. where the debtor is a man of straw.)

⁵¹ *Supra*. Also see, for example, the facts of *Pienaar v Boland Bank and Another supra*, where Pienaar attempted to settle a mortgage debt owed by his former partner, not in order to benefit the former partner, but in order to prevent foreclosure of the bond over property in which Pienaar had an interest.

⁵² See 435G: 'A ... sonder opdrag of kennis van C 'n skuld betaal wat C teenoor B het, nie met die doel om daardeur vir C te bevoordeel nie maar suiwer in sy eie belang....' ('A ... without a mandate or knowledge of C, A pays a debt that C owes B, not with the intention of thereby advantaging C but purely in his own interests...')

⁵³ See the judgment at, e.g., 436G.

⁵⁴ *Union Bank v Beyers*; *Union Bank v Du Toit supra* at 102; *Reliance Agencies (Pty) Ltd v Patel supra* at 472-3; *Jones & Druker NNO & Another v Durban City Council & Another supra* at 371B; *Pienaar v Boland Bank and Another supra* at 110; Van der Merwe *et al Contract* 492; Hutchison (ed) *Wille's Principles* 471.

⁵⁵ *Bousfield v The Divisional Council of Stutterheim supra* at 70; *Rossler v Kemsley Millbourn Acceptance Corporation supra* at 344; *Reliance Agencies (Pty) Ltd v Patel supra* at 472-3; *Pienaar v Boland Bank and Another supra* at 110; *Volkskas Bank Bpk v Bankorp Bpk (t/a Trust Bank) en 'n Ander* 1991 (3) SA 605 (A) at 612; De Wet and Van Wyk *Kontraktereg* 260.

⁵⁶ *Union Bank v Beyers*; *Union Bank v Du Toit supra* at 102; *Bousfield v The Divisional Council of Stutterheim supra*; *Rolfes, Nebel & Co v Zweigenhaft supra* at 195 ('even though the debtor is unwilling'); *Estate Thomas v Kerr & Another supra* at 367; *Rossler v Kemsley Millbourn Acceptance Corporation supra* at 344; *Reliance Agencies (Pty) Ltd v Patel supra* at 472-3; *Jones & Druker NNO & Another v Durban City Council & Another supra* at 371B ('even against his will'); *Pienaar v Boland Bank and Another supra* at 110; *Wessels Contract* para 2130-1; De Wet and Van Wyk *Kontraktereg* 260: 'selfs teen die sin van die skuldenaar.'; Hutchison (ed) *Wille's Principles* 471.

creditor is not entitled to reject a performance tendered by a third party⁵⁷ and there is some academic support for this proposition.⁵⁸ In German law, although the debtor's approval is unnecessary for the extinction of the obligation,⁵⁹ the creditor may refuse the performance if the debtor objects⁶⁰ and at least one commentator states that the obligation will not be extinguished if the debtor has objected to the performance.⁶¹

Another important difference between South African and German law should be noted at this stage. In terms of German law, if a third party makes a performance owed by B to C, thinking that he is performing on his own behalf, the debt will not be extinguished and the debtor (B) will remain bound.⁶² In South African law, on the other hand, it appears that a performance made by a third party under the erroneous impression that he was fulfilling his own obligation, might still extinguish the debt in question.⁶³

In terms of German law, the debt in question could arise from any sort of legal obligation.⁶⁴ The South African examples that most readily spring to mind are contractual⁶⁵ (e.g. B owes C R1 000 in terms of a contract of sale, lease,⁶⁶ loan⁶⁷ or

⁵⁷ *Pienaar v Boland Bank and Another supra* at 111D-F and 115D-E. Cf *Boland Bank Ltd v Pienaar and Another supra* (i.e. the AD decision), which reversed the decision but on different grounds, namely that a mortgagor can rely on a foreclosure clause even if the outstanding performance has been tendered. Although the court thus effectively, though not explicitly, decided that the creditor can ignore a tender of performance by a third party, this cannot be regarded as the *ratio decidendi* of the judgment, as the judge did not discuss, let alone attach any significance to the fact that the performance was tendered by a third party and not the debtor.

⁵⁸ See, e.g. Wessels *Contract* para 2133.

⁵⁹ See § 267 (1) sent 2 BGB.

⁶⁰ § 267 (2) BGB.

⁶¹ *Münchener Kommentar/Lieb* § 812 marg note 101.

⁶² Medicus *Schuldrecht I* marg note 140; *Palandt* § 267 marg note 4: 'Fehlt eine ... [Tilgungsbestimmung], etwa bei der Leist[un]g eines PutativSchul[dner], liegt keine wirks[ame] Erfüll[un]g vor; der Anspr[uch] des Gläub[iger] besteht weiter.' ('If there is no decision to pay (*Tilgungsbestimmung*), e.g. where there is a performance by a putative debtor, there will be no effective fulfilment; the creditor's claim will continue to exist.') On the *Tilgungsbestimmung*, see Chapter One at p 35 above.

⁶³ This is implied by Van der Merwe *et al Contract* 492n74: 'Performance by a third party who mistakenly believes himself to be the debtor may permit recovery by means of the *condictio indebiti*.' In this sentence, they may merely be referring, however, to a situation where the performance took the form of payment of money: ownership would be transferred by way of *commixtio*, regardless of the intention of the paying party.

⁶⁴ *Palandt* § 267 marg note 1: it applies to all debt-relationships, even those in public law. This is also indicated by the fact that § 267 is situated in the General Part of the BGB.

⁶⁵ And this rule is discussed in textbooks on the law of contract, rather than those concerned with other areas of law. The cases which state this rule do not, however, limit it to the fulfilment of only contractual obligations.

⁶⁶ See, for example, *Jones & Druker NNO & Another v Durban City Council & Another supra*; *Union Bank v Beyers*; *Union Bank v Du Toit supra*; *Estate Thomas v Kerr & Another supra*.

some other contract). It is submitted, however, that the obligation could also be delictual (e g B owes R1 000 to C as compensation for injury), that it could arise from a court order (e g a court orders B to pay his ex-wife C R1 000 monthly as maintenance),⁶⁸ from a statute (e g A, the purchaser of land, who has not yet received transfer, pays rates due on the property;⁶⁹ or A pays a sum owed by B to the Receiver of Revenue),⁷⁰ or *ex lege* in terms of some other branch of the common law (e g a trader, A, supplies necessities to B's dependant, thus fulfilling his duty of support).⁷¹ It could even be merely a natural obligation (e g a parent settles debts incurred by his child).

It seems that the performance in question could be any sort of positive performance. Thus a *datio* (whether this be the transfer of ownership or merely the handing over of possession) or a *factum* would extinguish the obligation (unless of course it were an *obligatio non faciendi*.)

From the above it is clear that, provided that certain requirements are satisfied, a third party's (A's) performance will indeed extinguish B's obligation to C. In such circumstances, C can thus usually not be regarded as having been enriched, provided that B does in fact owe the performance to C.⁷² The question that then arises is whether A can bring an enrichment action against B. He can only do so if he can prove that B was enriched *sine causa*. In order to determine whether B's enrichment was unjustified, we have to consider the legal relationships, if any, between A and B, on the one hand, and between A and C, on the other.

If, on the other hand, these requirements are *not* satisfied, or if B does not owe the performance to C at all, we are faced with a different picture. Thus, for example, if A can prove that while he made a performance to C, he did not thereby intend to settle B's debt, B's debt will not be extinguished, C will have acquired

⁶⁷ See, for example, *Pienaar v Boland Bank & Another supra*; *Boland Bank v Pienaar & Another supra*.

⁶⁸ In terms of s 7(2) of the Divorce Act (Act 70 of 1979). For other examples of payments of judgment debts, see *Reliance Agencies (Pty) Ltd v Patel supra* and *Resnik v Lekhetso supra*. As in *Bousfield v The Divisional Council of Stutterheim supra*.

⁶⁹ As in *Commissioner for Inland Revenue v Visser supra*.

⁷⁰ See, for example, *Gammon v McClure* 1925 CPD 137; *Behr v Minister of Health* 1961 (1) SA 629 (SR).

⁷¹ In other words, where C's receipt of the payment is cancelled out by the loss of his right to claim performance from B. Cf German law, where the requirement is not that someone be 'enriched', but that he 'receive something' ('erlangt etwas').

something without losing a corresponding right to claim performance (because he will retain his right to sue B for performance), and C will thus be enriched. Similarly, should A perform to C in terms of an obligation that has either ceased to exist, or that never existed at all, C will not be entitled to the performance and it is therefore he who will be enriched. For example, the aunt (mentioned in the example given above)⁷³ pays the university, intending to settle her nephew's fee account, not realising that the amount has already been paid. Or she pays the university, unaware that her nephew has not registered for the year and has therefore not incurred any liability. In both cases, the university will surely be the enriched party. Again, the legal relationship, if any, between the parties will be relevant in determining whether C is obliged to disgorge the enrichment and, if so, to whom.⁷⁴

Let us now examine the relationship between A and B.

THE RELATIONSHIP BETWEEN A AND B⁷⁵

1 Introduction

The rules discussed in the above section clarify what happens in terms of the relationship between B and C when A performs to C. What about A's relationship to B? As suggested in the introduction to this chapter, A's payment to C might have been prompted by A's legal relationship to B. Several of these legal relationships will be considered elsewhere in this thesis e.g. where A has a contractual obligation to perform to B, and B instructs A rather to perform to C.⁷⁶ In order to evaluate the effect, if any, of the existence of a contractual tie between A and B, it seems sensible first to consider the situation where these parties (A and B) are not linked by any contract at all, whether actual or merely purported. For the purposes of this discussion we will assume, for the time being,⁷⁷ that the debt owed by B to C was a

⁷³ At p 62.

⁷⁴ And it should always be borne in mind that the relationship between A and B has to be seen through the eyes of C in terms of German law. In other words, what is important is not so much the actual relationship between A and B, but C's perception of that relationship.

⁷⁵ In German terms, the 'Deckungsverhältnis', or 'cover relationship'.

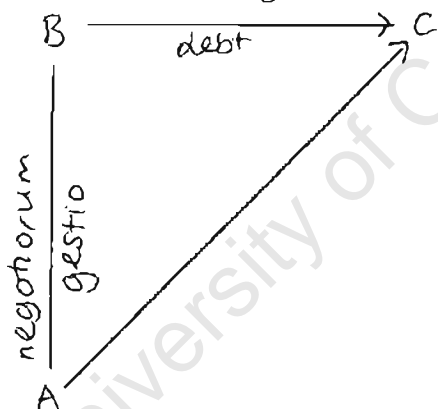
⁷⁶ See Chapter Three below.

⁷⁷ Cf the discussion in section 4 at p 148 ff below.

valid one and that it was extinguished by A's performance to C.

A and B could also potentially be linked by rights and duties which do not have a contract as their source. Certain rights and duties could arise between them merely by virtue of A's performance itself.⁷⁸ This would happen, for example, if the requirements of *negotiorum gestio* were fulfilled. The existence of *negotiorum gestio* proper provides a *causa* or justification for enrichment, just as a contract does.⁷⁹ Partial fulfilment of the requirements of *negotiorum gestio*, however, constitutes one of the special instances of enrichment liability in South African and German law. The boundaries of such enrichment liability are defined by the boundaries of *negotiorum gestio* in both systems.⁸⁰ What, then, are the requirements of *negotiorum gestio* or *Geschäftsführung ohne Auftrag*,⁸¹ as it is known in its German guise?

2 Unauthorised management of the affairs of another (*negotiorum gestio*)⁸²



Negotiorum gestio has been defined as 'the voluntary management by one person (the *negotiorum gestor*) of the affairs of another (the *dominus negotiū*) without the

⁷⁸ In other words, not by consensus, but by virtue of B's act vis-à-vis C.

⁷⁹ See Hans Brox and Wolf-Dietrich Walker *Besonderes Schuldrecht* 25 ed (2000) marg note 374.

⁸⁰ But cf, e.g., the approach in *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) where the court insisted that the plaintiff not merely prove that he had incurred expenses (as required in order to sue on the basis of *negotiorum gestio*), but that he prove the amount by which the other party was enriched (at 181H). In other words, the judge considered the requirements of the enrichment action separately in their own right.

⁸¹ Literally, 'administration without mandate'.

⁸² See Van Zyl *Negotiorum Gestio* and Zimmermann *Law of Obligations* 436 ff for the historical development of this institution. South African law has deviated very little from the Roman and Roman-Dutch law in this regard: Van Zyl *Negotiorum Gestio* 6, 8; Leslie Rubin *Unauthorized Administration (Negotiorum Gestio) in South Africa* (1958) 11, 15; *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd supra* at 387H.

consent or even the knowledge of the other'.⁸³ More accurately, it denotes the legal relationship that comes into being between the parties when the *gestor* manages the affairs of the *dominus* without his prior consent. It thus refers not to the factual circumstances themselves but to the legal institution⁸⁴ that arises *ex lege* when certain requirements are fulfilled.

These requirements, and the consequences which flow from the existence of *negotiorum gestio*, seek to balance the interests of the parties by ensuring a fair allocation of risks:⁸⁵ to protect the interests of the *gestor* who acts out of altruism⁸⁶ but also to discourage him from unwarranted meddling in another's affairs.⁸⁷ While the institution can be seen as promoting altruism (whether for moral or economic motives),⁸⁸ it should be borne in mind that the approach of German and South African law is pragmatic rather than idealistic.⁸⁹ The altruism required of the *gestor* in these legal systems is thus a limited sort of altruism. For example, a truly altruistic attitude (i.e. where someone intends to help another without expecting any recompense) excludes *negotiorum gestio*: in such circumstances the *gestor* will have made a donation.⁹⁰ In evaluating the rules, the primary question should not be whether they promote the ideals of self-sacrifice and noble benevolence,⁹¹ on the one

⁸³ Van Zyl *Negotiorum Gestio* 3-4. Also see Eiselen and Pienaar *Unjustified Enrichment* 205, where the authors seem to confuse the institution of *negotiorum gestio* with the actions arising therefrom.

⁸⁴ In German law, a 'gesetzliches Schuldverhältnis' (a statutory obligatory relationship).

⁸⁵ Medicus *Bürgerliches Recht* marg note 403; Brox and Walker (n 79) marg note 358; Zimmermann *Law of Obligations* 436 and 447-8; Whitty and Van Zyl (n 4) 373.

⁸⁶ See, e.g., the preface to Rubin (n 82): '*Negotiorum gestio* is based upon recognition of the need for encouraging a man to come to the aid of another when he is under no obligation to do so.' Also see *op cit* at 2.

⁸⁷ See John P Dawson *Unjust Enrichment* (1951) 137: '... the *negotiorum gestio* has centered on one leading idea – that there should be compensation, as well as liability, for action undertaken on another's behalf through the motive of altruism.' Also see Hanoch Dagan 'In defence of the good samaritan' (1999) 97 *Michigan Law Review* 1152; Brox and Walker (n 79) marg note 358; D 50.17.36; Van Zyl *Negotiorum Gestio* 7n23. Acts committed in the interests of the *dominus* will not be regarded as wrongful, provided that the requirements of *negotiorum gestio* are satisfied: see Van Zyl *Negotiorum Gestio* 7-8, and the authorities cited there.

⁸⁸ See Eiselen and Pienaar *Unjustified Enrichment* 205: it is an 'action *sui generis* based on equity.' See Van Zyl *Negotiorum Gestio* 4-5. Also see Whitty and Van Zyl (n 4) 373: 'there is an economic as well as a moral case for encouraging altruistic conduct.'

⁸⁹ Both legal systems thus provide the same protection to a *gestor* who acts partly in his own interests and partly in the interests of another as to one whose motive is purely to help another: see pp 79 and 116 below.

⁹⁰ See, e.g., § 685 BGB; Van Zyl *Negotiorum Gestio* 36; Eiselen and Pienaar *Unjustified Enrichment* 205. But cf Jonathan M Silke *De Villiers and Macintosh The Law of Agency in South Africa* 3 ed (1981) at 276, where the authors state that such an intention is 'not readily presumed'.

⁹¹ Cf Zimmermann *Law of Obligations* at 439, where he mentions the difficulties of analysing

hand, or private autonomy on the other,⁹² but whether they steer a middle course between these extremes⁹³ and thus maintain an equitable balance between the interests of the parties, within the broader social and economic context.

The existence of this peculiarly civilian legal institution⁹⁴ can at least partly⁹⁵ be attributed to the nature of friendship (*amicitia*) amongst the upper classes in ancient Rome: '[t]he Roman considered himself bound to help his friend by no matter what sacrifice.'⁹⁶ Although the social and commercial *mores* prevailing in the 21st century arguably no longer reflect this ideal,⁹⁷ *negotiorum gestio* has survived, and their Roman pedigree is still clearly evident in the remarkably similar features of

certain categories of cases 'based on the theory of human help. This shows that genuine altruism is both an unrealistic and an unhandy criterion to determine the scope of application of *negotiorum gestio*.'

⁹² Cf Dagan (1999) 97 *Michigan Law Review* 1152.

⁹³ See Zimmermann *Law of Obligations* 466: 'the extent of the gestor's liability reflects the peculiar position of the institution of *negotiorum gestio* between *amicitia* and *libertas*.'

⁹⁴ See Zimmermann *Law of Obligations* 435; Whitty and Van Zyl (n 4) at 367. Also see Zimmermann *Law of Obligations* 448 ff regarding institutions developed in common law systems to fulfil similar functions.

⁹⁵ See Van Zyl *Negotiorum Gestio* 5 for explanations and justifications for the retention of the institution in the common law. Cf Silke (n 90) at 272, where the authors suggest that the importance of *negotiorum gestio* will wane with improvements in communication. Also see Fritz Schulz *Classical Roman Law* (1951) 624. Cf the view expressed by Rubin (n 82) in his preface. Also see Whitty and Van Zyl (n 4) 371 and 373 (where they also mention the impact of public-law legislation). But it is debatable whether *negotiorum gestio* will decline in importance: with increasing globalisation comes increasing mobility, so the frequency of absences might balance out the increase in accessibility via modern telecommunications. Modern technology has also arguably increased the number of cases of unconscious *domini* – both due to car accidents, and because medical expertise can keep injured people alive, though unconscious, for longer.

⁹⁶ See Schulz (n 4) 234; Rubin (n 82) 3; Zimmermann *Law of Obligations* 435. See D 3.5.1, where Ulpian explains the reasons for its introduction. The archetypal case was one where someone handled the affairs of an absent friend, but *negotiorum gestio* also fulfilled other functions in Roman law e.g. it was used to afford a right of recourse to curators and procurators: see Zimmermann *Law of Obligations* 436-7. The pragmatic Romans allowed the friend a claim, provided that the friend intended to claim expenses (see note 96 below). Regarding family members, cf Van Zyl *Negotiorum Gestio* 36: 'In most cases where the administration of affairs was inspired or motivated by family bonds based on piety, pity, generosity or affection, such as maintaining children, tending the sick or burying the dead, it was accepted that the expenses incurred would not be claimed at a later stage, unless it could be shown that the gestor intended recovering his expenses and disbursements'. Also see Zimmermann *Law of Obligations* 439. This exception finds expression in § 685 BGB: 'The manager does not have any claim if he did not have the intention to demand compensation from the principal. If parents or grandparents furnish maintenance to their descendants, or the latter to the former, it is to be presumed, in case of doubt, that there is no intention to demand compensation from the recipient.' (Translation taken from Zimmermann *op cit* 439n52.)

⁹⁷ But cf Whitty and Van Zyl (n 4) 372, where they raise the interesting question whether the law of *negotiorum gestio* mirrors the 'traditional social values of *ubuntu* which form an integral part of the value system established by the new Constitution of South Africa. At first sight it seems that the doctrine does give practical and legal effect to some key values of *ubuntu* including human dignity, respect, inclusivity, compassion and concern for others.'

the modern South African and German law of *negotiorum gestio*, or *Geschäftsführung ohne Auftrag*. For brevity's sake, I will deal with the South African and German institutions together, where their rules coincide, and I will generally use the South African terminology.

The first requirement for the existence of a relationship of *negotiorum gestio* in both systems is that someone (the *gestor* or *Geschäftsführer*) must have administered an affair or affairs (of another).⁹⁸ It is clear that payment of another's debt constitutes 'administration' for the purposes of *negotiorum gestio*.⁹⁹ It has even been said that this is the most common instance of such administration, in German law at least.¹⁰⁰ It is, however, just one example falling within the compass of the broad concept of administration (*gestio* or *Geschäftsbesorgung*).¹⁰¹ Other examples might thus include entering into contracts,¹⁰² running a business,¹⁰³ maintaining

⁹⁸ Van Zyl *Negotiorum Gestio* 10 and 24-8; Wessels *Contract* para 3555; Eiselen and Pienaar *Unjustified Enrichment* 205; Whitty and Van Zyl (n 4) 373 ('negotium', 'business or transaction or affairs'); *Turkstra v Massyn* 1959 (1) SA 40 (T) at 47. Regarding German law, see § 677 BGB: 'Geschäftsbesorgung' (which may be translated as 'management' or 'administration'); Medicus *Schuldrecht II* marg note 616-17; Brox and Walker (n 79) marg note 360-1. This concept is common to mandate and *negotiorum gestio* and this is why the two concepts are neighbours in the BGB: see Medicus *Schuldrecht II* marg note 617; Kropholler *BGB* vor § 677 marg note 1.

⁹⁹ See, e.g., D 3.5.42 (43) per Labeo: 'Cum pecuniam eius nomine solueres, qui tibi nihil mandauerat, negotiorum gestorum actio tibi competit, cum ea solutione debitor a creditore liberatus sit: nisi si quid debitoris interfuit eam pecuniam non solui.' 'Since you made a payment in the name of a man who had given you no mandate, an action for unauthorised administration is available to you, since by this payment the debtor has been freed from liability by his creditor; unless there was any advantage to the debtor in not being paid.' (Translated by Mommsen, Krueger and Watson.) (Cf the pleadings in *Odendaal v Van Oudshoorn supra* at 434B, where the advocate mistakenly cites this text.) Also see D 3.5.5.3; Van Zyl *Negotiorum Gestio* 11n37; Whitty and Van Zyl (n 4) 380. *Negotiorum gestio* is not the only legal institution used to provide the performing party with a remedy in German law; he could be afforded a remedy via a *cessio legis*: see Zimmermann *Law of Obligations* 447n110.

¹⁰⁰ See Dawson (n 87) 141 where he says that it is most common instance in German and French law. Also see the South African cases discussed below, particularly those mentioned under the heading of the *mala fide gestor*.

¹⁰¹ § 677 BGB is read very widely and includes doing anything which is of use to another, even if it only takes a moment: see Zimmermann *Law of Obligations* 447; Medicus *Schuldrecht II* marg note 617, where he cites the example of someone wrenching a steering wheel around in order to avoid hitting a child which has jumped into the road: BGHZ 38, 270 (275). Medicus *loc cit*: it need not even be a legal act. The concept is also very wide in South Africa: see e.g. Van Zyl *Negotiorum Gestio* 11 ff, 17 (where he states that it is sufficient if the *dominus* has an interest in the administration (also see Rubin (n 82) 16-17 in this regard) e.g. the provision of household necessities); Silke (n 90) 279-81; Whitty and Van Zyl (n 4) 380 ff. On the questions whether exceeding the bounds of a mandate or mistakenly believing that one was mandated would constitute a *gestio* see Van Zyl *Negotiorum Gestio* at 18 and Eiselen and Pienaar *Unjustified Enrichment* at 205-6.

¹⁰² For example, sale of perishable goods, suretyship, insurance: see Van Zyl *Negotiorum Gestio* 11-15 for these and other examples. See, for example, *Hochmetals Africa (Pty) Ltd v Olavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A) (purchaser entering into further contract of

children,¹⁰⁴ medically treating someone who is unconscious,¹⁰⁵ tending crops or putting out a fire.¹⁰⁶

This transaction must be carried out not for oneself¹⁰⁷ but for another (the *dominus* or *Geschäftsherr*).^{108 109} It appears that if the transaction is partly in the interests of the *dominus* and partly in the interests of the *gestor*, *negotiorum gestio* could still arise.¹¹⁰ A genuine relationship of *negotiorum gestio* will not come into being, however, if someone carries out an affair solely for his own benefit or if he administers his own affairs, thinking that they are those of another.¹¹¹ It is immaterial whether the *gestor* knew the actual *dominus* or whether he was mistaken as to his identity:¹¹² a relationship of *negotiorum gestio* will arise between the *gestor* and the party whose affairs have in fact been administered.¹¹³

sale for original seller).

¹⁰³ See, e.g., *Kehrman v Stewart* 1905 TS 677. Other examples: collecting debts (*Van Zyl Negotiorum Gestio* 12); acting as a trustee (*op cit* 15); repairing or protecting property (*op cit* 14).

¹⁰⁴ See *Van Zyl Negotiorum Gestio* 13. Cf Roman law – see the quotation in note 96 above.

¹⁰⁵ Medicus *Schuldrecht II* marg note 623.

¹⁰⁶ In other words, it covers more ground than performance of another's obligation/§ 267 BGB. It is important to remember this when dealing with the special enrichment actions that arise in this context: they are not confined to situations where A extinguishes B's obligation to C, but have a much wider scope.

¹⁰⁷ See, e.g., Eiselen and Pienaar *Unjustified Enrichment* 206, where the authors state that a *gestor* must 'not act in his own interest', in their treatment of the *animus negotia aliena gerendi*. It is submitted that whether the administration in question is that of another and whether the *gestor* intended to act for another are slightly different questions, the first objective, and the second subjective: also see Whitty and Van Zyl (n 4) 375.

¹⁰⁸ § 677 BGB; Brox and Walker (n 79) marg note 359 (this constitutes genuine/*echte Geschäftsführung ohne Auftrag*, as opposed to non-genuine/*unechte Geschäftsführung ohne Auftrag* – see the discussion at p 101 ff below). German writers treat this requirement separately from the first; in South African law, the two are conflated in one enquiry: see, e.g., Medicus *Schuldrecht II* marg notes 617 ('Geschäftsbesorgung') and 618 ('Fremdheit des Geschäfts'). In German law, the question whether it was the affair of another is determined objectively, but if the relevant act is 'objectively neutral', then it is determined subjectively: see Medicus *Schuldrecht II* marg note 618. On South African law, see *Van Zyl Negotiorum Gestio* 24-8; Wessels *Contract* para 3555; Eiselen and Pienaar *Unjustified Enrichment* 205. This is not to say that the *gestor* acts as an agent; he must intend to administer the affairs of *dominus*, but in his own capacity. See e.g. D 3.5.2; *Van Zyl Negotiorum Gestio* 11; Medicus *Schuldrecht II* marg note 619.

¹⁰⁹ See, e.g., Zimmermann *Law of Obligations* 433; Whitty and Van Zyl (n 4) 373. Also see the next paragraph and p 116 below.

¹¹⁰ See *Van Zyl Negotiorum Gestio* 25, Eiselen and Pienaar *Unjustified Enrichment* 206, and the discussion of the *mala fide* and *bona fide gestores* below. Regarding German law, see, e.g., Brox and Walker (n 79) marg note 359; Medicus *Schuldrecht II* marg note 618-9.

¹¹¹ Eiselen and Pienaar *Unjustified Enrichment* 206; *Van Zyl Negotiorum Gestio* 26 and 40; Rubin (n 82) 16, 36; Silke (n 90) 275; Whitty and Van Zyl (n 4) 376; *Klug and Klug v Penkin* 1932 CPD 401; *New Club Garage v Milborrow and Son* 1931 GWL 86 at 99; Wessels *Contract* para 3576; § 686 BGB; Medicus *Schuldrecht II* marg note 621; Brox and Walker (n 79) marg note 362.

¹¹² § 686 BGB; Medicus *Schuldrecht II* marg note 621. See *Van Zyl Negotiorum Gestio* 26; Silke (n 90) 276. But cf *ABSA Bank Ltd v Bankfin v C B Stander v C A W Paneelkloppers*

Coincidental benefit to the *dominus* is insufficient:¹¹⁴ the transaction must also be carried out with the intention of doing so for this other person. In other words, the *gestor* must act with the *animus negotia aliena gerendi*¹¹⁵ or *Fremdgeschäftsführungswille*.¹¹⁶ He does not have to intend solely to act for the *dominus*, however. The *gestor* will be regarded as having the requisite intention even if his intention is mixed (i.e. he intends to promote his own interests as well as those of the *dominus*).¹¹⁷ This requirement embraces, not only the intention to benefit the *dominus*,¹¹⁸ but also the intention to recover necessary and useful expenses from the *dominus*.¹¹⁹ Another way of putting this is that the *gestor* must

1998 (1) SA 939 (C). The *dominus* need not have contractual capacity: see Van Zyl *Negotiorum Gestio* 26 and the authorities cited there.

¹¹⁴ There might even be a relationship of *negotiorum gestio* where the *dominus* has not benefited at all – see the discussion of the requirement that the *gestio* be *utiliter coeptum* at p 86 ff below.

¹¹⁵ Van Zyl *Negotiorum Gestio* 31-40; Eiselen and Pienaar *Unjustified Enrichment* 206 ('with the intention of promoting the interests of another person'); Whitty and Van Zyl (n 4) 375-6; Rubin (n 82) 34-42; Wessels *Contract* paras 3569-78; *Odendaal v Van Oudtshoorn supra* at 437A; *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd supra* at 388A-B; *Maritime Motors (Pty) Ltd v Von Steiger and Another* 2001 (2) 584 (SE).

¹¹⁶ §§ 677 and 687 (1) BGB; Medicus *Schuldrecht II* marg note 619; Brox and Walker (n 79) marg note 362. If this requirement is not satisfied, i.e. if the *gestor* treats the transaction as his own, whether or not he knows that he is not entitled to do so, there will be no genuine *negotiorum gestio* (*echte Geschäftsführung ohne Auftrag*), but a non-genuine one (*unechte Geschäftsführung ohne Auftrag*), provided that the other requirements are satisfied (see, e.g., *Palandt* § 687 marg note 2). In such a case, § 687 (2) BGB will apply. In other words, the *dominus* may claim *inter alia* compensation for any damages arising from the *gestio*, the furnishing of information and the rendering of an account, the handing over of anything received as a consequence of the *gestio*, and interest on any money spent by the *gestor* that he should have spent for the *dominus* or that he had to account to the *dominus* (§ 681, read with §§ 666 to 668 BGB *mutatis mutandis*). Should he enforce these claims, the *dominus* will be obliged to hand over any benefits received as a result of the *gestio* (§ 684 sent 1 BGB) i.e. he will be liable in terms of the law of unjustified enrichment, but only if he enforces his claims in § 687 (2) BGB. For further, more detailed, discussion see p 101 ff below.

¹¹⁷ See, e.g., Whitty and Van Zyl (n 4) 376. This corresponds to the position in Roman law and modern German law: see Zimmermann *Law of Obligations* 433. This requirement will be discussed in further detail at p 116 below. Rubin (n 82) states (at 34) that in such a case the *gestor* can 'claim to the extent that it is the affair of the *dominus*.'

¹¹⁸ Cf Van Zyl who, at 32-3 in *Negotiorum Gestio*, seems to suggest actual benefit rather than merely the intention to benefit, particularly at 33n128 (but cf 35 and 35n137: 'In general the Roman-Dutch writers require the intention to manage the affairs of the *dominus*.' Cf also Van Zyl *op cit* 69: benefit not necessary.) See quote from *Odendaal v Van Oudtshoorn supra* at 437A: 'die bedoeling om C te bevoordeel' cf *Taylam's case supra* at 388B: 'the intention not only of administering the affairs of the *dominus* but also of being compensated for such administration.' In German law, there has been some controversy as to whether this intention must be subjectively determined or whether it will suffice if the affair is objectively that of another (see the text to note 129 ff below), but it seems that where the subjective intention is required, it should be that any advantages flowing from the *gestio* should accrue to the *dominus* (see, e.g., Brox and Walker (n 79) marg note 362) i.e. the *gestor* must intend, by his act, to benefit the *dominus*.

¹¹⁹ The *animus repetendi or recipiendi*: Van Zyl *Negotiorum Gestio* 33, 35 ff; Rubin (n 82) 34; *Taylam's case supra* at 388B. That this is also so in German law is implied by the fact that

not have intended to make a donation to the *dominus*.¹²⁰

It is this intention that is the characteristic feature of a genuine relationship of *negotiorum gestio*;¹²¹ should someone administer the affairs of another without this intention (i.e. where he intends solely to benefit himself), there will be no genuine *negotiorum gestio*,¹²² although there might be an analogous relationship which also has certain, albeit different, consequences. (The most important of the legal consequences of such a relationship is that the only relief accorded to the *gestor* is that he can claim only to the extent of the *dominus*'s enrichment.) In German law, this analogous relationship goes by the name of *unechte Geschäftsführung ohne Auftrag* ('non-genuine *negotiorum gestio*'), which is something of a misnomer because the absence of the crucial intention means that it strictly falls outside the domain of *Geschäftsführung ohne Auftrag*. South African law also recognises the relationship (which may be called *quasi negotiorum gestio*)¹²³ that arises when someone administers the affairs of another without the *animus negotia aliena gerendi*¹²⁴ and, like German law, regards it as being outside the parameters of *negotiorum gestio* properly so-called.¹²⁵

the *Geschäftsführer* has no claim for expenses if he did not intend to claim expenses from the *Geschäftsherr* (i.e. where he intends to make a donation): see § 685 BGB; Medicus *Schuldrecht II* marg note 626; Brox and Walker (n 79) marg note 377.

¹²⁰ See, e.g., Eiselen and Pienaar *Unjustified Enrichment* 205; Van Zyl *Negotiorum Gestio* 36-9; Silke (n 90) 276; *Odendaal v Van Oudtshoorn supra* at 436; Medicus *Schuldrecht II* marg note 626. See note 96 above regarding the presumption that a *gestio* in favour of a family member would be regarded as having been made *animo donandi*. To the same effect, see § 685 sent 2 BGB. Cf Silke (n 90) *loc cit*: (regarding the *animus donandi*): 'but such an intention will not readily be presumed, even as between parent and child.'

¹²¹ Or *Geschäftsführung ohne Auftrag*.

¹²² Silke (n 90) 275; Eiselen and Pienaar *Unjustified Enrichment* 206; J E Scholtens 'Negotiorum gestio and unjust enrichment' (1951) 68 *SALJ* 134 at 137.

¹²³ As it was labelled in *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T) at 571A; Van Zyl *Negotiorum Gestio* 24. (Cf Van Zyl's criticism of the use of this expression in Wessels *Contract* to denote agency by necessity: *Negotiorum Gestio* 10n33.) Also cf the nomenclature used by Eiselen and Pienaar *Unjustified Enrichment* 205 (where they seem to refer to the legal institution itself as 'negotiorum gestorum utilis') and 228 (where they refer to the enrichment action as the 'actio negotiorum gestorum utilis'), for example.

¹²⁴ Either because he intends to benefit himself i.e. to act *sui lucri causa* (the *mala fide gestor*) or because he erroneously thinks that he is administering his own affairs (the *bona fide gestor*): see Van Zyl *Negotiorum Gestio* 31, and p 95 ff below.

¹²⁵ These concepts will be examined in more detail later at p 101 ff (*unechte Geschäftsführung ohne Auftrag*) and p 110 ff (*quasi negotiorum gestio*). The other circumstances in which relationships akin to *negotiorum gestio* or *Geschäftsführung ohne Auftrag* are said to arise (e.g., in South African law, where the affairs of a minor are administered, or where the *gestor* acts against the express wishes of the *dominus*) will also be discussed at that stage.

In South Africa, the *gestor*'s intention, though subjective,¹²⁶ is determined with reference to the surrounding circumstances.¹²⁷ In view of the practical difficulties involved in proving a subjective intention,¹²⁸ German law has developed rules in order to assist in determining whether the *Geschäftsführer* had the necessary intention.¹²⁹ The law presumes that he had the intention to administer an affair for another where the affair in question is 'objectively that of another'.¹³⁰ In all other cases,¹³¹ the *gestor* specifically has to prove that he had the requisite intention, and he must do so by showing that he had given it outward expression.¹³² An affair will be 'objectively that of another' if it clearly belongs within 'another's sphere of interest'.¹³³ Thus, for example, feeding someone else's child will be regarded as 'objectively the affair of another' and it can be presumed that anyone who does so had the intention to administer the affair of the child's parent or guardian. Similarly, performance in terms of an obligation is the responsibility of the debtor, so a third party who performs in terms of the obligation of another is administering an affair that is 'objectively that of another' and it will be presumed that he did so with the *Fremdgeschäftsführungswille*.¹³⁴

¹²⁶ Van Zyl *Negotiorum Gestio* 31. According to Van Zyl *op cit* at 39, this requirement will be met even if the *gestor*'s intention arises from a mistake e.g. he thinks that he has been mandated to administer the affair of another. Also see Eiselen and Pienaar *Unjustified Enrichment* 206: 'The *gestor* will also be entitled to the action [i.e. the normal *actio negotiorum gestorum contraria*] if he was mistakenly under the impression that he had received authorization from the *dominus* to manage his affairs while there had been no authorization.' See Rubin (n 82) 34 to the same effect.

¹²⁷ Van Zyl *Negotiorum Gestio* 39.

¹²⁸ On these difficulties, see Medicus *Bürgerliches Recht* marg note 407.

¹²⁹ See Brox and Walker (n 79) marg note 363 ff.

¹³⁰ *Objectiv fremd*. Medicus *Bürgerliches Recht* marg note 409, where he says that this is according to the majority opinion. Hence Medicus's comment that the *Fremdgeschäftsführungswille* often amounts to a fiction: Medicus *op cit* 407.

¹³¹ In other words, where the affair is 'objectively neutral' (*objectiv neutral*) or 'subjectively that of another' (*subjektiv fremd*). An affair that is 'objectively neutral' becomes 'subjectively that of another' through the will of the *gestor*: see Medicus *Bürgerliches Recht* marg note 409.

¹³² See Medicus *Bürgerliches Recht* marg note 409; Brox and Walker (n 79) 364.

¹³³ See, e.g., Medicus *Bürgerliches Recht* marg note 409; Brox and Walker (n 79) 363. Where someone simultaneously carries out an affair of his own and that of another (e.g. where a tenant puts out a fire in rented premises), his intention will be presumed in the same way as where he carries out only the affair of another: Brox and Walker *op cit* 364a.

¹³⁴ In this regard, see Medicus *Bürgerliches Recht* marg note 408, where he also gives examples of situations which would not fall into this category. The classification of cases has led to its own difficulties (see Medicus *op cit* marg note 410 ff for a discussion of some controversial cases). In cases which do not clearly fall into one category or another, it seems that German law has merely exchanged one difficult enquiry (subjective intention) for another (categorisation), one of proof of fact for one of policy.

Both legal systems require that the *dominus*¹³⁵ must not have mandated or otherwise authorised the *gestor* to make the performance.¹³⁶ This requirement is necessary to distinguish *negotiorum gestio* from its close relative, the contract of mandate.¹³⁷ This idea is expressed in the German name, *Geschäftsführung ohne Auftrag*, which literally means 'administration without mandate'. What is required is not merely the absence of a mandate, however, but also the absence of any other sort of authorisation.¹³⁸ In South Africa, the ambit of 'mandate' or 'authorisation' in this sense is relatively wide, and *negotiorum gestio* correspondingly narrow. For example, it seems that ratification of *negotiorum gestio* by the *dominus* is tantamount to a tacit mandate.¹³⁹ Not very much is required for ratification, either; if the *dominus* were aware that the *gestor* was managing his affairs and did not seek to

¹³⁵ Van Zyl *Negotiorum Gestio* at 22: if a third party mandates the *gestor*, it could still constitute *negotiorum gestio*. Also see Rubin (n 82) 21.

¹³⁶ See § 677 BGB: 'ohne von ... [dem Geschäftsherr] beauftragt oder ihm gegenüber sonst dazu berechtigt zu sein....' In other words, not only mandate, but also any other legal relationship justifying performance for another, will exclude a relationship of *berechtigte Geschäftsführung ohne Auftrag*. (See, e.g., Medicus *Schuldrecht II* marg note 622; Brox and Walker (n 79) marg notes 357, 360 and 368.) Examples of such other legal relationships include those between members of a family but not public law duties: see Brox and Walker (n 79) marg note 368. The *herrschende Meinung* in German law is that a relationship of *Geschäftsführung ohne Auftrag* can also arise if the *gestor* and *dominus* purported to conclude a contract but it was void. This view has been criticised because, in such a situation, there is no intention to administer the affairs of another, and because the appropriate remedy where a performance has been made without a valid legal ground would be the *Leistungskondiktion*: see Brox and Walker (n 79) marg note 368; Medicus *Schuldrecht II* marg note 622. Medicus (*loc cit*) is of the view that where there is a void legal relationship between A and B, A's primary remedy should be the *Leistungskondiktion*. On the South African law, see Eiselen and Pienaar *Unjustified Enrichment* 205 ('The *gestor* must have acted on behalf of the *dominus* without any authorization or ratification.'): Silke (n 90) 272; *Mohamed v Kamaludien* 1938 CPD 140 at 145 ('The whole essence of *negotiorum gestio* is the absence of authority'); *Colonial Government v Smith and Company* (1901) 18 SC 380 at 392; *Klug and Klug v Penkin supra* at 404.

¹³⁷ Van Zyl *Negotiorum Gestio* 5: 'The essential element, ... which distinguishes *negotiorum gestio* from the consensual contract of mandate, is that it should be unauthorised (*sine mandato*).' Also see Rubin (n 82) 20, and the references cited by Van Zyl *loc cit* at 5n17. The two concepts are closely related in that, apart from authorisation, the factual circumstances are similar, and, once the relationship arises, certain legal consequences are almost identical. The essential difference is that mandate is based on *consensus*, while *negotiorum gestio* arises from the act of administration, together with the *gestor's animus negotia aliena gerendi*. Mandate is therefore a contract, while *negotiorum gestio* is a quasi-contract. For a comparison of the two legal institutions, see Zimmermann *Law of Obligations* 433-4. (See Van Zyl *Negotiorum Gestio* 4, 8n25, 11, 84, 94 for references to the quasi-contractual basis of *negotiorum gestio*.) The closeness of the relationship between the two legal constructs in German law is illustrated by their placement one after the other in the BGB.

¹³⁸ § 677 BGB; Medicus *Schuldrecht II* marg note 622 (*Geschäftsführung ohne Auftrag* is thus excluded where there is any contractual or statutory duty between the parties); Brox and Walker (n 79) marg note 357; Van Zyl *Negotiorum Gestio* 30.

¹³⁹ Van Zyl *Negotiorum Gestio* 5, 138. On the question of ratification and whether it results in *negotiorum gestio* or a contract of mandate, see Van Zyl *Negotiorum Gestio* 19 ff.

prevent it, his acquiescence would amount to ratification.¹⁴⁰ In other words, for a case to qualify as one of *negotiorum gestio* in South Africa, the act of administration must be done without the knowledge of the *dominus*.¹⁴¹ he must either be absent, unaware of the *gestio* or lack capacity.¹⁴² In German law, on the other hand, while authorisation is also wider than mere mandate, and includes any legal relationship justifying performance to another,¹⁴³ it does not go as far as South African law. Awareness or ratification of the administration would not exclude *Geschäftsführung ohne Auftrag*.¹⁴⁴ The potential range of cases falling within the scope of *Geschäftsführung ohne Auftrag* in Germany is thus wider than those which would qualify as *negotiorum gestiones* in South Africa.

In German law, there is a dispute as to whether *Geschäftsführung ohne Auftrag* can arise where the *dominus* and *gestor* purported to conclude a contract but it is void for some reason, or the administration exceeded the bounds of a valid contract between the parties. For example, B agrees to paint C's house for €1 000, which is a reasonable price considering the size of the house. Another painter, A, who is in a desperate financial situation, approaches B to ask him for a loan. B agrees to lend him €500, if he (A) paints C's house. The agreement between A and B would be void because B has exploited A's need in obtaining his consent to make a performance out of proportion to B's counterperformance.¹⁴⁵ Should A paint C's

¹⁴⁰ Van Zyl *Negotiorum Gestio* 5, where the author draws the analogy of the ratification of the acts of an hitherto unauthorised agent by a principal. Also see Van Zyl *Negotiorum Gestio* at 30: 'It is clear that, if the *dominus* should indeed be aware of the management of his affairs or if he should consent thereto, it is no longer *negotiorum gestio*, but mandate.' He goes on (*loc cit*) to say that 'failure to prohibit or object to the management of affairs once the *dominus* has become aware of it, amounts to tacit or implied consent to or authorisation of such management of affairs, which in turn must be construed as mandate.' But see the same author's comment at 31: 'Should the *dominus* become aware of the *gestio* and ratify it, it would appear that either the actions arising from *negotiorum gestio* or those arising from mandate are available to the parties.' On ratification amounting to a tacit mandate, see Rubin (n 82) 23.

¹⁴¹ Rubin (n 82) 22; Van Zyl *Negotiorum Gestio* 28-31; Silke (n 90) 272; *Williams' Estate v Molenschoot and Schep (Pty) Ltd* 1939 CPD 360 at 369; *Turkstra v Massyn* *supra* at 47E-F; cf *De Hart v De Jongh* 1903 TS 260; *Mohamed v Kamaludien* *supra*; *Odendaal v Van Oudshoorn* *supra* at 437A. *Colonial Government v Smith and Company* *supra* at 392; *Ex parte Abbas* 1920 CPD 346 at 347: 'A *negotiorum gestor* is one who acts upon his own authority for an absent person.'

¹⁴² Whitty and Van Zyl (n 4) 374-5.

¹⁴³ See the references in note 138 above.

¹⁴⁴ See text to note 153 below: indeed, ratification is a *requirement* for *berechtigte* (justified) *Geschäftsführung ohne Auftrag*, or *negotiorum gestio* proper.

¹⁴⁵ See § 138 (2) BGB: 'Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren läßt, die in einem auffälligen Mißverhältnis

house notwithstanding the invalidity of the contract between A and B, would this amount to *Geschäftsführung ohne Auftrag*? Alternatively, A might make a performance greater than that required in terms of a valid contract. Thus, for example, A and B agree that A will pay B's rent of €500 to C, but instead of paying €500, A pays C €5 000. Would A's (over)payment constitute *Geschäftsführung ohne Auftrag*? Although the courts have in certain cases regarded such situations as falling within the scope of *Geschäftsführung ohne Auftrag*, the better view seems to be that they fall outside its scope because A does not intend to administer the affairs of another but to fulfil his own (supposed) obligation to B.¹⁴⁶ In such a case the primary remedy should accordingly be the *Leistungskondition*.¹⁴⁷

In order for the rights and duties relating to *Geschäftsführung ohne Auftrag*¹⁴⁸ to arise, German law requires, in addition, (1) that the *gestio* is in the interests of the *dominus*¹⁴⁹ and¹⁵⁰ in accordance with his actual or presumed will,¹⁵¹ or (2) that if it contradicts his will it is at least objectively in his interest,¹⁵² or (3) that it has been

zu der Leistung stehen.' ('A legal transaction is also void whereby a person exploiting the need, carelessness or inexperience of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which exceed the value of the performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance.')

¹⁴⁶ See Medicus *Schuldrecht II* marg note 622.

¹⁴⁷ Medicus *Schuldrecht II* marg note 622: otherwise the BGB's provisions on *Geschäftsführung ohne Auftrag* could be used to sidestep the limitations built into the law of enrichment. On the *Leistungskondition* in general, see Chapter One.

¹⁴⁸ These correspond to the rights and duties arising from a contract of mandate (*Auftrag*): in other words, the *Geschäftsführer* must carry out the *gestio* properly (§ 677 BGB), furnish a report etc (§§ 681, 666 BGB), give up anything he has received by virtue of the *gestio* (§§ 681, 667 BGB), compensate the *Geschäftsherr* for culpable damage. The *Geschäftsführer* can, in turn, claim reimbursement of his expenses (§ 683 BGB) or § 280 ff and § 284 ff BGB (provisions relating to impossibility and breach) will apply. See text at p 92 ff below.

¹⁴⁹ Determined objectively: see Brox and Walker (n 79) marg note 369.

¹⁵⁰ While the BGB requires both, it appears that where the administration in question is not in the interests of the *Geschäftsherr* but is in accordance with his actual will, the requirements for *berechtigte Geschäftsführung ohne Auftrag* would be met: see Medicus *Bürgerliches Recht* marg note 422.

¹⁵¹ § 683 sent 1 BGB: 'Entspricht die Übernahme der Geschäftsführung dem Interesse und dem wirklichen oder dem mutmaßlichen Willen des Geschäftsherrn, so kann der Geschäftsführer wie ein Beauftragter Ersatz seiner Aufwendungen verlangen.' ('If taking over the *gestio* is in the interests of the *dominus*, and corresponds to his actual or presumed will, then the *gestor*, like a mandatary, can claim his expenses'.) See Brox and Walker (n 79) marg note 369, where he points out that the presumed will usually coincides with the objective interest of the *Geschäftsherr*.

¹⁵² § 683 sent 2, read with § 679 BGB. § 683 sent 2 BGB: 'In den Fällen des § 679 steht dieser Anspruch dem Geschäftsführer zu, auch wenn die Übernahme der Geschäftsführung mit dem Willen des Geschäftsführer mit dem Willen des Geschäftsherrn in Widerspruch steht.' ('In cases covered by § 679, this claim is afforded to the *gestor*, even if taking over the *gestio* was against the will of the *dominus*.') The circumstances covered by § 679 BGB: in the absence of such a *Geschäftsführung* there would not have been no timeous compliance with a statutory duty on the part of the *dominus* to pay maintenance (in terms of family law or the

ratified by the *dominus*.¹⁵³ In these circumstances,¹⁵⁴ it will be regarded as a 'justified *negotiorum gestio*' (*berechtigte Geschäftsführung ohne Auftrag*). If, however, none of these circumstances are present, but all the other requirements for *Geschäftsführung ohne Auftrag* are satisfied, the relationship between the parties will amount to an 'unjustified *negotiorum gestio*' (*unberechtigte Geschäftsführung ohne Auftrag*).¹⁵⁵ The importance of the distinction is that, as with the case of non-genuine, or *unechte, Geschäftsführung ohne Auftrag*,¹⁵⁶ different consequences flow from a relationship of *unberechtigte Geschäftsführung ohne Auftrag*. (These will be discussed at a later stage.¹⁵⁷ Most importantly, the *gestor* will not be able to claim all his expenses, as he would in a case of *berechtigte Geschäftsführung ohne Auftrag*, but is confined to a claim for the amount by which the *dominus* is enriched by the *gestio*.)

The last requirement for *negotiorum gestio* in South African law is that the management must have been *utiliter coeptum*.¹⁵⁸ This requirement has been expressed in various ways: for instance that the *gestio* should have been reasonable,¹⁵⁹ *bona fide*,¹⁶⁰ beneficial to the *dominus*,¹⁶¹ useful,¹⁶² necessary,¹⁶³ in the

law of succession, and not a merely contractual duty), or some other duty imposed on the *dominus* in the public interest.

¹⁵³ § 684 sent 2 BGB: 'Genehmigt der Geschäftsherr die Geschäftsführung, so steht dem Geschäftsführer der im § 683 bestimmte Anspruch zu.' ('If the *dominus* ratifies the *gestio*, the *gestor* will be entitled to the claim specified in § 683.') (i.e. claim to expenses). Such ratification need not be express: see, e.g., Brox and Walker (n 79) marg note 371.

¹⁵⁴ Which are regarded as justification grounds: see, e.g., Brox and Walker (n 79) marg note 369.

¹⁵⁵ Medicus *Bürgerliches Recht* marg note 422. *Unberechtigte Geschäftsführung ohne Auftrag* will be discussed in detail at p 97 ff below.

¹⁵⁶ Note that the two concepts (*unberechtigte* and *unechte Geschäftsführung ohne Auftrag*) are not synonymous. While *unberechtigte Geschäftsführung ohne Auftrag* is regarded as falling within the parameters of *Geschäftsführung ohne Auftrag* in general and is characterised by its not being in accordance with the will of the *dominus*, *unechte Geschäftsführung ohne Auftrag* falls outside the boundaries of *Geschäftsführung ohne Auftrag* altogether and is characterised by the absence of the intention to administer the affairs of the *dominus*. Although *unberechtigte Geschäftsführung ohne Auftrag* is regarded as an instance of *Geschäftsführung ohne Auftrag*, it attracts different consequences to *berechtigte Geschäftsführung ohne Auftrag* in that, for example, the *gestor* has an enrichment action rather than an action for his expenses. These distinctions are discussed in more detail below at 97 ff.

¹⁵⁷ At p 97 ff.

¹⁵⁸ Van Zyl *Negotiorum Gestio* 40-6; Rubin (n 82) 23 ff; Whitty and Van Zyl (n 4) 376 ff; Wessels *Contract* paras 3552, 3620, 3625; *Wolmaransstad Ko-operatiewe Vereniging v Leask & Co* 1915 TPD 272 at 276; *Colonial Government v Smith and Company* *supra* at 392; *Amod Salie v Ragoon* 1903 TS 100 at 103; *Lewis Brothers v East London Municipality* 21 SC (1904) 156 at 162; *Williams Estate v Molenschoot & Schep* *supra*; *Standard Bank Financial Services v Taylam (Pty) Ltd* *supra*.

¹⁵⁹ See Eiselen and Pienaar *Unjustified Enrichment* at 205, Van Zyl *Negotiorum Gestio* at 40; *Lewis Brothers v East London Municipality* *supra* at 162.

¹⁶⁰ See, e.g., *Amod Salie v Ragoon* *supra* at 103; *William's Estate v Molenschoot and Schep (Pty) Ltd* *supra* at 367 and Van Zyl *Negotiorum Gestio* at 43.

dominus's interests,¹⁶⁴ or such that the *dominus* would have performed it himself.¹⁶⁵

The requirement thus seems to cover some of the same ground as the German requirements mentioned in the previous paragraph and serves a similar purpose, namely to limit interference in the affairs of others to circumstances where such interference would generally be seen as just or socially desirable.¹⁶⁶ As yet, however, the South African requirement has not been precisely formulated and there is uncertainty as to its scope.¹⁶⁷

While '[t]here are dangers in an unduly conceptual approach',¹⁶⁸ modern authors have made various attempts to define what '*utiliter*' means. Thus Rubin refers to the interests of the *dominus*¹⁶⁹ and suggests that the administration should be such that the *dominus* would have undertaken it himself,¹⁷⁰ but adds that this is an objective criterion in that what is relevant is 'not whether the *gestor* believed that the administration would benefit the *dominus* but whether it was in fact calculated to benefit the *dominus*.'¹⁷¹

Van Zyl criticises Rubin's approach and says that 'regardless of whether the *dominus* would himself have managed the particular affair or affairs, if the *gestor*'s

¹⁶⁴ See, e.g., *Klug and Klug v Penkin* *supra* at 404. Also see the other cases mentioned by Van Zyl (*Negotiorum Gestio* at 43n182). Also see Rubin (n 82) at 23-4, 26 (criticism) 28.

¹⁶⁵ See Van Zyl *Negotiorum Gestio* at 40.

¹⁶⁶ See, e.g., *Wolmaransstad Ko-operatiewe Vereeniging v Leask & Co* *supra* at 276; *Klug and Klug v Penkin* *supra* at 404; cf Van Zyl's criticism in *Negotiorum Gestio* at 42 and Whitty and Van Zyl (n 4) 377 ff.

¹⁶⁷ Rubin (n 82) 24; Eiselen and Pienaar *Unjustified Enrichment* 205.

¹⁶⁸ Rubin (n 82) 24; Van Zyl *Negotiorum Gestio* 43.

¹⁶⁹ See, e.g., Rubin (n 82) 23: in Roman law, the action for expenses was 'available only where an intervention, prima facie unwarranted, could be justifiable on equitable grounds.' Also see Whitty and Van Zyl (n 4) 376 (It 'is the main safeguard against "officious intermeddling"'); *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* *supra* at 392. The test postulated in this case (viz that the 'meddling [should be] ... necessary in order to do justice between man and man.') is reminiscent of the balancing of interests necessary in deciding whether the *par delictum* rule should be relaxed or not, as recommended in *Jajbhay v Cassim* 1939 AD 537. Various other analogies come to mind e.g. the requirement that in order to rely upon a material mistake in the conclusion of an apparent contract, one must prove that it amounted to an *iustus error* (see, e.g., *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Spindriftier (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); D B Hutchison and B J van Heerden 'Mistake in contract: A comedy of (justus) errors' (1987) 104 *SALJ* 522). More pertinently, one can compare the function of the *utiliter*-requirement with the general requirement that enrichment be *sine causa*.

¹⁷⁰ For example, (regarding one formulation of the test) see Whitty and Van Zyl (n 4) 380: 'It is an open question how far the test of the presumable wishes of the *dominus* is objective or subjective, or how, if at all, it would apply where the *dominus* is *incapax*.'

¹⁷¹ Whitty and Van Zyl (n 4) 377.

¹⁷² (n 82) at 24.

¹⁷³ (n 82) at 24 and 26.

¹⁷⁴ (n 82) at 26. Also see *op cit* 23-5.

conduct was reasonable in all the circumstances of the case,¹⁷² he will have acted *utiliter*.¹⁷³ While Van Zyl regards reasonableness as being the common denominator of all the tests mentioned so far,¹⁷⁴ he acknowledges the fact that various sources focus on the wishes of the *dominus*,¹⁷⁵ and says that ‘if the act was indeed one which the *dominus* himself would have performed, having regard to all the surrounding circumstances, there is little doubt that such act will be considered *utiliter* ...’.¹⁷⁶ He adds, however, that accordance with the wishes of the *dominus* is not a general test, and should not be applied without exception, for to do so might impose too heavy a burden of proof on the *gestor*, ‘who would have to show that the subjective attitude of the *dominus* would have been such as to prompt him to conduct the affair or affairs himself’.¹⁷⁷ He points out that a further defect of the test is that it enables the *dominus* too easily to rebut the *gestor*’s allegation that the administration was *utiliter*; he would simply have to prove that in the same circumstances he would not have done what the *gestor* did.¹⁷⁸

De Vos asserts that the administration must have been reasonable and ‘of such a nature that it was in the interests of the *dominus* that the administration took place.’¹⁷⁹ Similarly, Eiseien and Pienaar state that the administration ‘must have been reasonable and in the interest of the *dominus* (*utiliter coeptum*).’¹⁸⁰

¹⁷² He must mean the circumstances that existed at the time the *gestio* was undertaken, and not those that followed: see *Negotiorum Gestio* 41.

¹⁷³ *Negotiorum Gestio* 41, where he says that the weight of authority does not support Rubin’s view.

¹⁷⁴ See *Negotiorum Gestio* 40n167 and 41.

¹⁷⁵ See, e.g. De Vos *Verrykingsaanspreeklikheid* 40 and Whitty and Van Zyl (n 4) 379.

¹⁷⁶ *Negotiorum Gestio* 43. This sentence as a whole is somewhat confusing if looked at in isolation; he says ‘In determining whether the management of affairs complies with the requirement of *utiliter coeptum*, an objective approach is followed: if the act was indeed one which the *dominus* himself would have performed, having regard to all the surrounding circumstances, there is little doubt that such act will be considered *utiliter*, regardless of the final outcome thereof.’ This is confusing because the second part of the sentence arguably does not follow from the first: referring to what this particular *dominus* would have done in the circumstances can surely not be an objective test, unless it is an objective test which takes subjective factors into account. It appears from the rest of his discussion, however, that the main thrust of his argument is that the administration should be reasonable, which would indeed be an objective test. See, for example, his remarks at p 44 of the same work. Regarding the wishes of the *dominus*, also cf the sentence from Whitty and Van Zyl (n 4) 380 quoted in note 167 above.

¹⁷⁷ *Negotiorum Gestio* 44.

¹⁷⁸ *Negotiorum Gestio* 44.

¹⁷⁹ *Verrykingsaanspreeklikheid* 39 (my translation). But cf *op cit* 40, where he says that if the *gestio* is clearly contrary to the wishes of the *dominus* it will not be *utiliter*, which suggests that he regards this as the decisive criterion..

¹⁸⁰ *Unjustified Enrichment* 205.

Although the definition of the *utiliter*-requirement remains unsettled,¹⁸¹ it thus appears that three criteria have found favour amongst the commentators: the wishes of the *dominus*, reasonableness, and the interests of the *dominus*. The first question that arises in this regard is whether the test is objective or subjective. While the criterion of reasonableness is clearly objective, the wishes and interests of the *dominus* could be objective or subjective criteria. The second question concerns the relationship between the criteria: does the *gestor* have to satisfy all of these three tests, or are they alternatives?

When Rubin states that the test based on the wishes of the *dominus* is an objective one, he apparently means that it is objective in the sense that the *gestor*'s intention is not taken into account.¹⁸² The test, as he describes it, is subjective in a different sense, however. It is subjective in that what is relevant is the actual will of this particular *dominus*, and not his presumptive will. Van Zyl's criticism of Rubin's views appears to be aimed at this notion that the 'wishes of the *dominus*' is a subjective test i.e. that the actual wishes of this particular *dominus* are decisive.

It is also not immediately apparent whether 'the interest of the *dominus*' is an objective or subjective criterion. One can argue that it poses a subjective test if it requires the *gestor* to prove that the *gestio* was in the interest of this particular *dominus*, i.e. taking his personal circumstances into account.¹⁸³ On the other hand, it would clearly be an objective test if all that is required is proof that the administration would generally be to the advantage of someone in the position of the *dominus* i.e. not taking all his personal circumstances into account. The writers who state that the *gestio* must be reasonable *and* in the interests of the *dominus* do not discuss the question of the objectivity or subjectivity of the latter criterion, and do not closely consider the relationship of these two criteria:¹⁸⁴ does a *gestor* have to satisfy both tests (viz that his actions were reasonable and also that they were in the

¹⁸¹ See, most recently, the views of Whitty and Van Zyl (n 4) 376 ff.

¹⁸² Cf the argument that the test for intention and the test for excusability should not be confused – see Whitty and Van Zyl (n 4) 379.

¹⁸³ This criterion is similar, but not identical, to that of the wishes of the *dominus*: a particular act might be in someone's interest but against his wishes (e.g. it would usually be in someone's interest to pay his debt – provided that it was not about to prescribe etc – but it could be against his wishes if he does not want to accept charity and wants to settle it himself).

¹⁸⁴ Eiselen and Pienaar go on to restate the requirement in such a way that it suggests that the criterion is objective.

interest of the *dominus*), as they seem to suggest? Would it suffice if he showed that a reasonable person would have undertaken the *gestio* and incurred these expenses without reference to the particular circumstances of the *dominus*? While the two criteria would obviously often overlap, such questions might arise in circumstances where an act of administration is objectively reasonable and yet not (subjectively) in the interests of this specific *dominus*.¹⁸⁵ For example, it might seem reasonable to pay a debt for a cash-strapped friend, but this might not be in his interests if the debt is about to prescribe.¹⁸⁶

Our law apparently holds that such a transaction would be *inutiliter*.¹⁸⁷ This suggests, in other words, that there would be no relationship of *negotiorum gestio* in a situation where the *gestio* is not subjectively in the interests of the *dominus*, even though it seems reasonable from an objective point of view. It would thus be a more accurate reflection of the current state of our law to say that the *gestio* must have been reasonable and *subjectively* in the interests of the *dominus*. It appears that, unlike German law, South African law only allows a claim for expenses if *both* of these requirements are fulfilled, and not merely one or the other.¹⁸⁸

Requiring the *gestor* to prove that the *gestio* was both reasonable and subjectively in the interests of the *dominus*,¹⁸⁹ however, raises the problem highlighted by Van Zyl: the *gestor* would have to bring evidence concerning the particular situation of the *dominus*, which may well be inaccessible. This means that even if the *gestor* could show that his conduct was reasonable, the *dominus* would be able to defeat the *gestor*'s claim for expenses by showing that it was not in his interests. This seems rather unfair to a *gestor* who has, after all, acted as a reasonable person would have done.

In German law, it will be recalled, a *gestor* can claim his expenses whether the *gestio* is in the interests of the *dominus* and in accordance with his actual or

¹⁸⁵ Or in accordance with his actual wishes.

¹⁸⁶ Or it would arguably be reasonable to put out a fire that threatens to destroy a neighbour's house, but this might not be in the neighbour's interest if the house was in such a dilapidated state that he would have derived more benefit from an insurance payout.

¹⁸⁷ See Van Zyl *Negotiorum Gestio* 45, and the references cited there.

¹⁸⁸ See previous footnote.

¹⁸⁹ Or in accordance with his actual wishes.

presumed will, or whether is at least objectively in his interest.¹⁹⁰ It seems, therefore, that the hurdles to be leapt in order to win an action for expenses are lower for a German than a South African *gestor*. It should also be borne in mind that if a German fails to clear these hurdles, he will still win a claim based on enrichment, whereas a South African might be left with nothing at all.¹⁹¹ The present state of South African law is also open to the criticism that it confers too much discretion on individual judges; in effect, should all the other requirements be met, the judge has to assess whether the *gestor*'s action amounts to *negotiorum gestio* by reference to a somewhat vague and nebulous notion.¹⁹² The uncertainty as to precisely what is meant by 'utiliter coeptum' could deter parties from suing and, more importantly, from acting in the first place. The lack of clarity could thus undermine our legal system's recognition and protection of 'altruistic intermeddlers'.

A more equitable accommodation of the interests of both parties could be achieved either by allowing the *gestor*'s claim for expenses if he could prove either of these alternatives (i.e. that the *gestio* had been reasonably undertaken, or that it was subjectively in the interests of the *dominus*),¹⁹³ or (preferably) by recasting the requirement in an entirely objective mould, as suggested by the following sentence taken from Eiselen and Pienaar:

...the question is whether a *bonus paterfamilias* would have incurred the same expenses or whether it was reasonable that the expenses be incurred on behalf of the *dominus* in these specific circumstances.¹⁹⁴

This would amount to stating that a *gestio* would be justifiable (or excusable) if it was reasonably undertaken, or objectively in the interests of the *dominus*, or in accordance with his presumptive wishes.

Finally, it should be mentioned that, while the requirement that the *gestio* be *utiliter* in some respects corresponds fairly closely to the special requirements for *berechtigte Geschäftsführung ohne Auftrag* stated above, South African law demands less in that the *gestio* need be *utiliter* only at the outset: a successful outcome is not

¹⁹⁰ See p 85 above.

¹⁹¹ But cf Van Zyl *Negotiorum Gestio* 45.

¹⁹² Cf the advantages of the criterion of reasonableness, not the least being its familiarity as a legal norm.

¹⁹³ Cf the approach in the South African law of contract regarding *iustus error*. See the references in note 166 above.

¹⁹⁴ Eiselen and Pienaar *Unjustified Enrichment* 205.

required in order for a relationship of *negotiorum gestio* to arise.¹⁹⁵ It seems, therefore, that if A intends to settle B's debt to C, and does not succeed in doing so, A and B will nevertheless be linked by a relationship of *negotiorum gestio*. Also, as already pointed out,¹⁹⁶ a relationship of *berechtigte Geschäftsführung ohne Auftrag* can arise where the administration is later ratified by the *dominus*, whereas it seems that South African law would regard ratification as excluding *negotiorum gestio* altogether.¹⁹⁷

The classification of a set of circumstances as being an instance of *negotiorum gestio* or *berechtigte Geschäftsführung ohne Auftrag* brings certain consequences in its train. Most importantly for our purposes, the existence of a relationship of *negotiorum gestio* excludes enrichment liability.¹⁹⁸ In other words, a benefit transferred as a consequence of *negotiorum gestio* cannot generally be regarded as having been acquired *sine causa*: just as a contract provides a "causa" for an enrichment, so too can a quasi-contract¹⁹⁹ such as *negotiorum gestio*.²⁰⁰

Negotiorum gestio also gives rise to certain reciprocal obligations.²⁰¹ Thus, in German law, but not apparently in South African law, the *gestor* is obliged to inform

¹⁹⁵ See Rubin (n 82) 24: 'Regard must be had, not to the outcome of the gestorial act, but to its character and to the surrounding circumstances at the time it was performed.' Also see Rubin *op cit* 26; Eiselen and Pienaar *Unjustified Enrichment* 205; Van Zyl *Negotiorum Gestio* 41 and 44-5; De Vos *Verrykingsaanspreeklikheid* 40; Whitty and Van Zyl (n 4) 376, 378. The outcome of the *gestio* is thus unimportant e.g. the requirements of *negotiorum gestio* could be satisfied if A attempts to put out a fire for his neighbour B but does not succeed in extinguishing the flames.

¹⁹⁶ See the text to notes 144 and 153 above.

¹⁹⁷ See, e.g., De Vos *Verrykingsaanspreeklikheid* 40, where he expresses the view that if the *gestor* incurred disproportionately high expenses (i.e. acted *inutiliter*) in successfully administering the affairs of another, the *dominus* should distance himself from the proceeds, lest his acceptance be construed as ratification of the *gestio*. But cf Van Zyl *Negotiorum Gestio* 39, 46.

¹⁹⁸ See, e.g., Eiselen and Pienaar *Unjustified Enrichment* 205, 228.

¹⁹⁹ Cf Eiselen and Pienaar *Unjustified Enrichment* 205, where they argue that it should not be referred to as a quasi-contract, but should rather be regarded as an 'action *sui generis* based on equity.'

²⁰⁰ Re German law: it generally constitutes a legal ground in terms of § 812 (1) sent 1 BGB and therefore excludes enrichment liability.

²⁰¹ Van Zyl *Negotiorum Gestio* 47 ff. In German law, with its usual 'economy of legal forms', the *gestor* in such circumstances (i.e. *berechtigte Geschäftsführung ohne Auftrag*) is treated in the same way as a mandatary: Medicus *Schuldrecht* II marg note 626; Zimmermann *Law of Obligations* 433 (and, for an exception, see *op cit* 444-5); Kropholler *BGB vor § 677* marg note 3. These obligations are treated in this chapter in the barest outline as, unlike the requirements for the coming into being of *negotiorum gestio*, they do not assist in determining the scope of enrichment liability.

the *dominus* of the *gestio* as soon as possible.²⁰² In both systems, the *gestor* must complete the *gestio*²⁰³ properly,²⁰⁴ taking a reasonable amount of care.²⁰⁵ He must therefore compensate the *dominus* for any damage caused by his negligence.²⁰⁶ He must give the *dominus* any proceeds received as a result of the *gestio*,²⁰⁷ necessary information and an account of the *gestio* on completion thereof.²⁰⁸

If the *gestor* complies with these duties, then he has a right to claim reimbursement of expenses incurred in the administration.²⁰⁹ The *dominus* also has

²⁰² § 681 sent 1 BGB; Medicus *Schuldrecht II* marg note 627.

²⁰³ Van Zyl *Negotiorum Gestio* 49-51; Rubin (n 82) 50; Silke (n 90) 276; *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd supra* at 580C.

²⁰⁴ § 677 BGB: *ordnungsgemäß* (appropriately). See Medicus *Schuldrecht II* marg note 627: in a way in which accords with the interest of the *Geschäftsherr*, with reference to his actual or supposed will. Also see Brox and Walker (n 79) marg note 373. South African law requires that the *gestio* be carried out properly, diligently and reasonably – see next footnote.

²⁰⁵ See, e.g., Whitty and Van Zyl (n 4) 387. On the specific standard of care required in South African law, see Van Zyl *Negotiorum Gestio* 57-66, especially 63 ff; *Jacobs v Maree* (1902) 19 SC 152; *Amod Salie v Ragoon supra*; *Lawrie v Union Government (Minister of Justice)* 1930 TPD 402; *Minister of Justice v Lawrie* 1930 TPD 877; *Mohamed v Kamaludien supra*; *Boyce NO v Bloem and Others* 1960 (3) SA 855 (T) at 866D-H. On the standard of care required in German law, see, e.g. Medicus *Schuldrecht II* marg note 627; Zimmermann *Law of Obligations* 447; Brox and Walker (n 79) marg note 375 (e.g. where the *Geschäftsführer* had limited or no capacity, he will only be liable in terms of the law of enrichment and the law of delict i.e. not in terms of the rules on *Geschäftsführung ohne Auftrag*: see § 682 BGB and the discussion at p 108 below).

²⁰⁶ Van Zyl *Negotiorum Gestio* 58; Whitty and Van Zyl (n 4) 369, 388; Eiselen and Pienaar *Unjustified Enrichment* 205; Silke (n 90) 276 (regarding the degree of care); Medicus *Schuldrecht II* marg note 627; Brox and Walker (n 79) marg note 375. Should the *Geschäftsherr* cause damage to the *Geschäftsführer*, he will also incur liability: see Brox and Walker *op cit* 376.

²⁰⁷ § 681 sent 2, read with § 667 BGB; Medicus *Schuldrecht II* marg note 627; Zimmermann *Law of Obligations* 433; Brox and Walker (n 79) marg note 374 (exception: where the *Geschäftsführer* lacked capacity or had limited capacity). Regarding South African law, see Van Zyl *Negotiorum Gestio* 55-7; Silke (n 90) 276; Whitty and Van Zyl (n 4) 368-9, 387; Eiselen and Pienaar *Unjustified Enrichment* 205 ('all profits'); *Grant's Farming Co Ltd v Attwell* (1901) 9 HCG 91.

²⁰⁸ § 681 sent 2, read with § 666 BGB. Van Zyl *Negotiorum Gestio* 51-5 (prior to the institution of a claim for expenses: see discussion at 53-5; Whitty and Van Zyl (n 4) 387; cf J E Scholtens 'The actio contraria of the negotiorum gestor and his duty to account' (1970) 87 *SALJ* 284); Eiselen and Pienaar *Unjustified Enrichment* 205; Silke (n 90) 276; and the references cited by Van Zyl *Negotiorum Gestio* at 51-2. Also see *Grant's Farming Co Ltd v Attwell supra* at 96; *Greenshields v Chisolm* 3 SC (1884) 220 at 226; Rubin (n 82) 51; *McEwen NO v Khader* 1969 (4) SA 559 (N); J E Scholtens 'An old question of enrichment liability: payment of another's debt' (1969) 86 *SALJ* 131.

²⁰⁹ § 683 sent 1 read with § 670 BGB. See, e.g. Medicus *Schuldrecht II* marg note 626. This applies unless the *gestor* did not intend to claim compensation from the *dominus* (i.e. where he intended to make a donation): § 685 (1) BGB. South African law: these must be useful expenses or disbursements: Van Zyl *Negotiorum Gestio* 67-71; Whitty and Van Zyl (n 4) 368, 385; Eiselen and Pienaar *Unjustified Enrichment* 205; *Klug and Klug v Penkin supra* at 404 ('if the person whose affairs have been managed has accepted the benefit of such unauthorised management' – cf comments by Van Zyl *Negotiorum Gestio* 43 on the notion of acceptance in this context); *New Club Garage v Milborrow and Son supra*; cf *Theron v Africa* (1893) 10 SC 246; Rubin (n 82) 65 ff; Wessels *Contract* para 3613; Silke (n 90) 277-8.

to reimburse the *gestor* for certain losses.²¹⁰ In South Africa, the *dominus* must also ensure that the *gestor* is released from any obligations incurred in the course of the *gestio*;²¹¹ and to grant the *gestor* a lien on his property (i.e. that of the *dominus*) pending satisfaction of his claims.²¹²

Should either party fail to fulfil these obligations, the other will be entitled to enforce performance. Thus, for example, if the *gestor* negligently causes damage, the *dominus* can sue for compensation.²¹³ In South Africa, the action of the *dominus* is called the *actio negotiorum gestorum directa* and the action of the *gestor* is called the *actio negotiorum gestorum contraria*.

Returning to the hypothetical situation that is the focus of this chapter (i.e. payment of the debt of another), the overall position may be summarised as follows: if A pays B's debt to C (and thereby extinguishes it), and if the requirements of *negotiorum gestio* proper (or *berechtigte Geschäftsführung ohne Auftrag*) are fulfilled, A will not be able to sue B for enrichment. *Negotiorum gestio* will constitute a legal ground or justification for the benefit to B. In other words, B's enrichment will not be unjustified. In such a case, however, A, as *gestor*, will be able to sue B for his expenses with the *actio negotiorum gestorum contraria*. Proving *negotiorum gestio* would generally be to the *gestor*'s advantage, as he would then be able to claim the amount by which he was impoverished, without being limited to the amount by which the *dominus* was enriched by the *gestio*. The first requirement of *negotiorum gestio* would usually be fulfilled here, assuming that there

²¹⁰ Van Zyl *Negotiorum Gestio* 67, 71-6; Zimmermann *Law of Obligations* 444; Whitty and Van Zyl (n 4) 386; Eiselen and Pienaar *Unjustified Enrichment* 205; *Standard Bank Financial Services v Taylam (Pty) Ltd supra* at 387H-388A; *Williams' Estate v Molenschoot and Schep (Pty) Ltd supra* at 370-2. In South African law, he would have to compensate for loss of interest (from the date of *litis contestatio*) but not, apparently, for a loss of income: Whitty and Van Zyl (n 4) 386. Regarding German law, see, e.g., Medicus *Schuldrecht II* marg note 626; Zimmermann *Law of Obligations* 445; Brox and Walker (n 79) marg note 376, where it is stated that the obligation of the *Geschäftsherr* to compensate for losses corresponds to the obligation of the mandatary, except that the *Geschäftsführer* is entitled to compensation for his work provided that the administration in question falls within the scope of his profession. (This exception is necessary because the BGB provides that mandate is gratuitous: also see Zimmermann *Law of Obligations* 445 in this regard.)

²¹¹ Van Zyl *Negotiorum Gestio* 76-8; Whitty and Van Zyl (n 4) 368, 385; Eiselen and Pienaar *Unjustified Enrichment* 205 ('he may claim that the *dominus* should honour all obligations concluded in the *gestor*'s name on behalf of the *dominus*.'); Wessels *Contract* para 3628; Rubin (n 82) 69-70; Silke (n 90) 278; *New Club Garage v Milborrow and Son supra* at 100; D 3.5.2 and the references cited by Van Zyl *Negotiorum Gestio* at 78n336.

²¹² Van Zyl *Negotiorum Gestio* 78-80; Whitty and Van Zyl (n 4) 387; Wessels *Contract* para 2629; Silke (n 90) 279; *New Club Garage v Milborrow and Son supra*.

²¹³ See the references cited in note 206 above.

is a debt B–C and that it was extinguished by A’s payment: A will have managed the affairs of another. Provided that he did so *animo negotia aliena gerendi*,²¹⁴ that B (the *dominus*) has not authorised the *gestio*, and that the management is *utiliter coeptum*, A will succeed in bringing an *actio negotiorum gestorum contraria* against B.

Let us now turn to the more important question for our purposes, namely what happens if these requirements are *not* satisfied.

3 Enrichment liability where B owes a performance to C, A performs to C and thereby extinguishes B’s obligation, and there is partial fulfilment of the requirements of *negotiorum gestio*

As stated above, where the requirements of *negotiorum gestio* are satisfied, we are not concerned with the law of enrichment:²¹⁵ *negotiorum gestio* constitutes a legal ground for anything given to or done for the *dominus* (including payment of his debts) by the *gestor*, and the latter will be entitled to claim all his expenses i.e. he will be entitled to full compensation for his loss.

If, however, only some of the relevant requirements are fulfilled, and the

²¹⁴ Here it should be noted that the *animus negotia aliena gerendi* must be distinguished from the intention to settle the debt of another (assuming that such intention is required for extinction of the debt), as discussed above at p 65 ff. In the latter case, one must intend to settle the debt of another, whereas for *negotiorum gestio*, one must intend to settle the debt of another for another (not solely for one’s own benefit, and not necessarily for the true debtor). Thus a debt might validly be settled by a *mala fide gestor* (who intends to settle someone’s debt for his own ends e.g. to promote his reputation as a benefactor, or to make him his own debtor): see the discussion of the *mala fide gestor* at p 111 below. Only if an obligation can be extinguished by the performance of a third party who mistakenly believes that he is the debtor could the situation of a *bona fide gestor* (who intends to settle a debt, thinking that it is his own) arise in this context: see the text to note 63 above and the section relating to the *bona fide gestor* at p 142 ff below. The easiest way to distinguish between these two kinds of intention is that the *animus negotia aliena gerendi* arguably refers to the motive which prompts the *gestor*’s act, whereas the intention to settle a debt is a requirement for (and therefore in a sense part of) the legal act in question. Regarding German law, it should be remembered that the requisite intention of a party who performs in terms of the obligation of another is often assessed from the perspective of the recipient (i.e. the creditor) (see the text to note 47 above), but if someone performs in terms of another thinking that he is settling his own debt, the debt will not be discharged: see p 72 above.

²¹⁵ It might therefore legitimately be asked why the law of *negotiorum gestio* has been discussed at all in this chapter. As will become clear, sketching this background is necessary because the requirements for certain enrichment actions depend, in both German and South African law, upon the fulfilment or non-fulfilment of the requirements for *negotiorum gestio*. See Chapter One at pp 51–2 on the interstitial nature of the law of unjustified enrichment.

relationship between A and B is therefore not one of *negotiorum gestio* proper (or *berechtigte Geschäftsführung ohne Auftrag*), and if there is also no contractual relationship between them, there will be no 'justification' or legal ground for the benefit to B. If A, as a result of performing in terms of B's obligation, is out of pocket, he cannot sue B for all of his expenses, but he will, in certain circumstances, be entitled to claim back the amount by which B is enriched by the *gestio*.²¹⁶ Partial fulfilment of the requirements for *negotiorum gestio* thus takes us out of the domain of *negotiorum gestio*, and into the domain of enrichment law.²¹⁷ Hence the spotlight shifts from the *gestor*'s loss to the *dominus*'s gain.

A is not, however, automatically entitled to sue B for enrichment in every case of partial fulfilment of the requirements for *negotiorum gestio*.²¹⁸ He has to prove that his case is one where a legal relationship akin to *negotiorum gestio* would arise:²¹⁹ in South African law, *quasi negotiorum gestio*; in German law, either *unberechtigte Geschäftsführung ohne Auftrag* (unjustified *negotiorum gestio*) or *unechte Geschäftsführung ohne Auftrag* (non-genuine *negotiorum gestio*).²²⁰ A's legal situation accordingly depends on which of the requirements of *negotiorum gestio* have been met. First the German, and then the South African position will now be discussed.

²¹⁶ It must be remembered that C does not come into the picture because the performance discharged B's obligation to him i.e., in South African terms, he has not been enriched.

²¹⁷ And, in certain circumstances, into the sphere of the law of delict: see pp 102, 105 ff and 108 below.

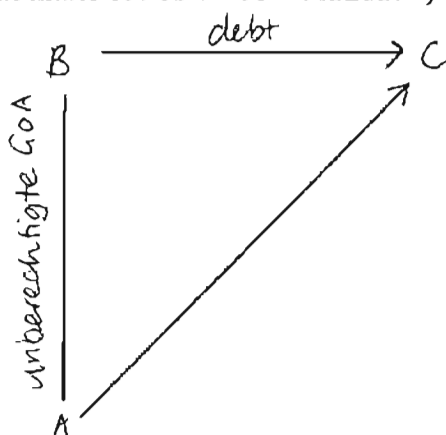
²¹⁸ For example, it seems that he would have no claim in South African law if he fulfilled all the requirements for *negotiorum gestio* except the requirement that the administration be *utiliter coeptum*. Cf the discussion of German law regarding *unberechtigte Geschäftsführung ohne Auftrag* immediately below.

²¹⁹ See p 75 above.

²²⁰ In German law, *berechtigte* and *unberechtigte Geschäftsführung ohne Auftrag* are regarded as being more closely related, and the *unechte* variant as being more deviant. I have, however, chosen to deal with *berechtigte Geschäftsführung ohne Auftrag* on its own, and the other two forms together, as the former constitutes a legal ground (*causa*) for enrichment and the latter two (arguably – see discussion below) not.

German law

- (a) *Unberechtigte Geschäftsführung ohne Auftrag*²²¹ ('unjustified administration without mandate')



This legal relationship²²² arises, according to German law, when the *gestio* was not

²²¹ See § 684 read with § 683 BGB. § 683 BGB: '[Ersatz von Aufwendungen] Entspricht die Übernahme der Geschäftsführung dem Interesse und dem wirklichen oder dem mutmaßlichen Willen des Geschäftsherrn, so kann der Geschäftsführer wie ein Beauftragter Ersatz seiner Aufwendungen verlangen. In den Fällen des § 679 steht dieser Anspruch dem Geschäftsführer zu, auch wenn die Übernahme der Geschäftsführung mit dem Willen des Geschäftsherrn in Widerspruch steht.' § 684 BGB: '[Herausgabe der Bereicherung] Liegen die Voraussetzungen des § 683 nicht vor, so ist der Geschäftsherr verpflichtet, dem Geschäftsführer alles, was er durch die Geschäftsführung erlangt, nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung herauszugeben. Genehmigt der Geschäftsherr die Geschäftsführung, so steht dem Geschäftsführer der im § 683 bestimmte Anspruch zu.' (§ 683 BGB: '[Reimbursement of outlays] If the undertaking of the management of the matter is in accordance with the interest and the actual or presumptive wishes of the principal, the manager may demand reimbursement of his outlays as a mandatary. In the cases provided for by § 679 this claim belongs to the manager even if the undertaking of the management of the matter is contrary to the wishes of the principal.' § 684: '[Return of enrichment] If the conditions of § 683 do not exist, the principal is bound to return to the manager all that he acquires through the management of the matter under the provisions relating to the return of unjust enrichment. If the principal ratifies the management of the affair, the claim specified in § 683 belongs to the manager.') (translated by Forrester *et al* (n 23)).

²²² According to the majority opinion, this relationship, unlike *berechtigte Geschäftsführung ohne Auftrag*, is not a 'statutory obligatory relationship' (*gesetzliches Schuldverhältnis*): see Brox and Walker (n 79) marg note 379. In other words, the provisions relating to the rights of the *Geschäftsherr* (§§ 677 and 681 BGB) do not apply by way of analogy to *berechtigte Geschäftsführung ohne Auftrag*. The only provisions that apply, according to this view, are those dealing with liability arising from unjustified enrichment and delict. This basically means that the *Geschäftsführer* (*gestor*) acquires rights (e.g. to an enrichment action), but the *Geschäftsherr* (*dominus*) does not, except that he has a right to compensation (especially conferred by § 687 BGB) if the *Geschäftsführer* should have been aware that the management of the affairs contradicted the actual or presumed will of the *Geschäftsherr*: see Medicus *Schuldrecht II* marg note 629; Brox and Walker *op cit* marg note 380. A minority view, which is gaining increasing support, however, advocates the application of §§ 667 and 681 BGB (i.e. the provisions relating to the obligation to inform, disgorge benefits, compensate for damages etc), on the ground that the *Geschäftsherr* would otherwise be in a better position here than where there is *berechtigte Geschäftsführung ohne Auftrag*: Brox and Walker (n 79) marg note 379. Also see Kropholler *BGB vor 677* marg note 4.

ratified by the *dominus*²²³ and is neither in the interests of the *dominus*, nor in accordance with his actual or presumed will²²⁴ but it otherwise fulfils the requirements outlined above. In other words, if someone administers the affair of another, aware that it is not his own affair but that of the other and intending to do it for the other, where it is, however, not in accordance with the interests or will²²⁵ of the *dominus*, then it will be a case of *unberechtigte Geschäftsführung ohne Auftrag*. For example, A settles B's debt to C, but does so when C's claim was about to prescribe.²²⁶

In such circumstances, A will be entitled, not to reimbursement of his expenses as in the case of *berechtigte Geschäftsführung ohne Auftrag*, but merely to any benefits received by the *dominus* (B) as a result of the *gestio*.²²⁷ In other words, he will have an enrichment claim. Why will it lie against B and not against C? A's performance has extinguished B's debt to C.²²⁸ Since C has merely received what he

²²³ Medicus *Schuldrecht II* marg note 628.

²²⁴ But this is disputed. In Medicus's view, the requirement (for *berechtigte Geschäftsführung ohne Auftrag*) that the *gestio* be in accordance with actual or presumed will of the *dominus* takes precedence over the requirement that it be in his interests i.e. the two alternatives do not stand on an equal footing. In other words, if a particular act of administration is in accordance with the will of the *dominus* but not in his interests, a relationship of *berechtigte Geschäftsführung ohne Auftrag* would still arise. He adds that the actual will of the *dominus* also takes precedence over his presumed will and it is only where his true will cannot be established that one considers his presumed will. In establishing the presumptive will of the *dominus*, one can have regard to what is objectively in his interests, but if the circumstances are such that his presumed will conflicts with his objective interests (e.g. because of his previous behaviour), then his presumed will takes precedence. According to Medicus, there is general agreement that this order of precedence applies regardless of what was discernible by the *gestor*. He thus cannot claim his expenses even if administering the affairs of another contradicts what is for him not discernibly the actual will of the *dominus*. There is, however, controversy as to whether the *gestor* benefits from the reduction of liability according to § 680 BGB if the *gestio* was undertaken to avoid an imminent danger to the *dominus*. For all of this, see Medicus *Schuldrecht II* marg note 624. If the case concerns a duty to act in the public interest (e.g. to prevent a car accident, but not to pay someone else's taxes) or a duty to pay maintenance, then the will of the *dominus* is irrelevant: see Medicus *Schuldrecht II* marg note 625.

²²⁵ Whether actual or supposed, preceding or subsequent – see previous footnote.

²²⁶ *Unberechtigte Geschäftsführung ohne Auftrag* could, of course, also arise in circumstances falling outside the purview of this chapter e.g. A engages a gardening service to mow the overgrown lawn belonging to a neighbour who is away for the weekend and this is not objectively in the neighbour's interests because the neighbour had a contract with another gardening service to do this anyway (adapted from an example given by Medicus in *Schuldrecht II* marg note 623).

²²⁷ § 684 sent 1, read with § 812 ff BGB. See Medicus *Schuldrecht II* marg note 628 and see footnote 221 above. Regarding the (controversial) question whether any of the obligations imposed by the BGB on *Geschäftsherr* in cases of *berechtigte Geschäftsführung ohne Auftrag* are also imposed on a *Geschäftsherr* in a situation of *unberechtigte Geschäftsführung ohne Auftrag*, see note 222 above.

²²⁸ §§ 267, 268 BGB; *Münchener Kommentar/Lieb* § 812 marg note 101 (except where it has been expressly been forbidden by the debtor in terms of § 267 (2) BGB); Medicus

was owed, and has thus simultaneously lost his right to claim performance, he has not received anything without legal ground.²²⁹ B, on the other hand, has received something²³⁰ in that his debt to C has presumably²³¹ been discharged. The majority opinion²³² is therefore that A will have an enrichment action (a *Rückgriffskondition*)²³³ against B. The limitation of A's claim to the measure of B's enrichment is justified on the grounds of fairness: the *dominus* does not have to pay for all of the *gestor*'s expenses and should at least not be allowed to retain what he received at the expense of another.²³⁴ In other words, the underlying motivation has nothing to do with the administration of the affairs of another, altruism, etc, but is rather concerned with the prevention of unjustified enrichment. The *dominus* is protected in that he will not have to give anything to the *gestor* if what he received is of no use or benefit to him and that is of such a nature that it cannot be given back.²³⁵ It is also suggested that, if he loses the enrichment, he should not be forced to pay the *gestor* the objective value of what he had received, because it was imposed upon him against his will.²³⁶

A's enrichment action derives from the relationship of *unberechtigte Geschäftsführung ohne Auftrag* (more specifically § 684 BGB) but its consequences are determined by the BGB's provisions on unjustified enrichment.²³⁷ It will be

²²⁹ *Bürgerliches Recht* marg note 684; Loewenheim *Bereicherungsrecht* 48.
²²⁹ *Münchener Kommentar/Lieb* § 812 marg note 101; Loewenheim *Bereicherungsrecht* 48; Medicus *Bürgerliches Recht* marg note 684.
²³⁰ According to *Münchener Kommentar/Lieb* § 812 marg note 102, there is controversy as to what he has actually 'received' (erlangt): Lieb's view is that he received the 'Befreiung von der Verbindlichkeit' (release from the obligation).
²³¹ If not, see Medicus *Schuldrecht II* marg note 628, and the discussion under 4 (a) below.
²³² See, e.g., *Münchener Kommentar/Lieb* § 812 marg note 101; Medicus *Bürgerliches Recht* marg note 684; *idem Schuldrecht II* marg note 722.
²³³ Medicus *Bürgerliches Recht* marg notes 684, 950 ff, *idem Schuldrecht II* marg note 722; Brox and Walker (n 79) marg note 413; *Münchener Kommentar/Lieb* § 812 marg notes 103, 104. Cf a minority opinion which holds that the enrichment action in question would be a *Leistungskondition* because the third party is performing in order to create a relationship of *berechtigte Geschäftsführung ohne Auftrag* with B. In other words, he performed with this specific purpose in mind and the failure of this purpose is the reason for the enrichment. See, e.g., Esser and Weyers (n 4) 346 ff and Loewenheim *Bereicherungsrecht* 48: *Leistungskondition*. On the *Rückgriffskondition*, and how it fits into the general scheme of the German law of enrichment, see Chapter One at p 24 above.
²³⁴ See Brox and Walker (n 79) marg note 381; Medicus *Schuldrecht II* marg note 628.
²³⁵ Medicus *Schuldrecht II* marg note 628.
²³⁶ Medicus *Schuldrecht II* marg note 628.
²³⁷ In other words, from § 812 ff BGB. According to the *herrschende Meinung*, only the consequences of § 812 ff apply, not their legal requirements: see Brox and Walker (n 79) marg note 381. Where *Geschäftsführung ohne Auftrag* relates to a triangular relationship, however, one should also refer to the requirements of the enrichment provisions: Brox and Walker *op cit* marg notes 381 and 413.

remembered that the *Rückgriffskondition* is one of the *Nichtleistungskonditionen*.²³⁸ At first blush, because we are dealing with a performance, it seems strange that the *Leistungskondition* is not the appropriate action. It is excluded because, in our situation, the performing party does not intend to settle his *own* debt, as is apparently required for the *Leistungskondition*.²³⁹

This legal situation could be exploited by third parties who pay the debts of others in order to become their creditors.²⁴⁰ Thus, to use Medicus's example, A might pay a debt owed by his neighbour B, in the hope that, if he (A) sues him (B) with the *Rückgriffskondition*, he (B) will be forced to sell the land that A wants to buy and that he (B) does not really want to sell.²⁴¹ Or even if the third party's motives are exemplary, the debtor might not want his debt settled;²⁴² for example, his debt may be about to prescribe or he might want to set it off against a debt owed to him by C.

If the debtor (B) is aware that A is about to settle his debt and objects, the creditor can refuse the performance.²⁴³ There is, however, no obligation on the creditor to do so, and it would be unlikely that a creditor would refuse the performance of a debt owed to him. There is therefore the real possibility that the legal rules might be abused to the disadvantage of debtors, and thus a need to provide protection.

This protection is provided by using the analogy of cession.²⁴⁴ In terms of the law of cession, a debtor may raise against the cessionary any defences which he had against the cedent at the time of the cession.²⁴⁵ Likewise, he may set off against the cessionary a claim which he has against the cedent, unless he knew about the cession when he acquired the claim, or the claim was not due until he had already become

²³⁸ See Chapter One at pp 24 and 29-30 above. Also see Medicus *Schuldrecht II* marg note 719, where he points out that the *Rückgriffskondition* can be seen as a special instance of an *Aufwendungskondition*.

²³⁹ See Medicus *Schuldrecht II* marg note 721, and see note 233 above. Also see Chapter One above.

²⁴⁰ Because this is a situation of so-called 'aufgedrängte Bereicherung' i.e. 'imposed enrichment': Medicus *Schuldrecht II* marg note 722; *idem* *Bürgerliches Recht* marg note 952. In other words, the enrichment is imposed on the debtor, regardless of his will.

²⁴¹ Medicus *Bürgerliches Recht* marg note 952.

²⁴² In other words, the settlement of his debt may be against his will.

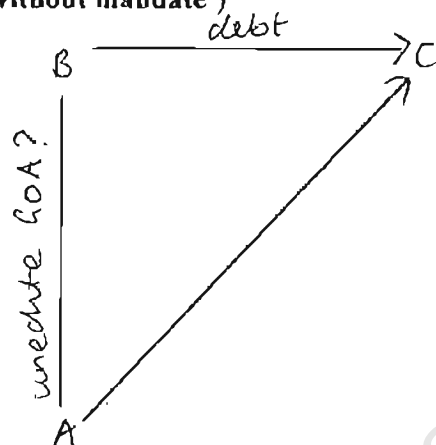
²⁴³ § 267 (2) BGB.

²⁴⁴ Medicus *Bürgerliches Recht* marg note 952; *idem* *Schuldrecht II* marg note 722.

²⁴⁵ § 404 BGB.

aware and the main debt had become due.²⁴⁶ These rules are applied *mutatis mutandis* in the context of *unberechtigte Geschäftsführung ohne Auftrag*. In other words, the original debtor in our set of circumstances may raise against the third party (A) any defences he would have had against the creditor (C) and, similarly, he may set off against the third party any claim that he had against the original creditor.²⁴⁷

(b) ***Unechte Geschäftsführung ohne Auftrag*** ('non-genuine administration without mandate')



The second 'poor relation' of *Geschäftsführung ohne Auftrag* in German law is the so-called *unechte Geschäftsführung ohne Auftrag*. As said above,²⁴⁸ because cases falling into this category are characterised by the absence of the intention to carry out an affair for another (the *Fremdgeschäftsführungswille*), this is, strictly speaking, not really an instance of *Geschäftsführung ohne Auftrag* at all;²⁴⁹ it goes by this name merely because it bears a close resemblance to members of that family.²⁵⁰

Unechte Geschäftsführung ohne Auftrag arises in two sets of circumstances.²⁵¹ Firstly, someone could take care what is objectively the affair of another,²⁵² thinking that it is his own,²⁵³ For example,²⁵⁴ someone carries out

²⁴⁶ § 406 BGB.

²⁴⁷ See Medicus *Bürgerliches Recht* marg note 952.

²⁴⁸ See p 81 above.

²⁴⁹ See, e.g., Palandt § 687 marg note 2.

²⁵⁰ And the applicable provision of the BGB (§ 687) falls within the section on *Geschäftsführung ohne Auftrag* properly so-called.

²⁵¹ See, e.g., Medicus *Bürgerliches Recht* marg note 416 ff.

²⁵² See, e.g., Palandt § 687 marg note 1. Also see note 276 below.

²⁵³ This is sometimes called *irrtümliche Eigengeschäftsführung* ('erroneous administration of own affairs'): see, e.g., Kropholler *BGB* § 687 marg note 1. This is the situation envisaged in § 687 (1) BGB: 'Die Vorschriften der §§ 677 bis 686 finden keine Anwendung, wenn

transactions in relation to certain property, in the *bona fide* belief that he owns²⁵⁵ or has inherited it.²⁵⁶ This type of situation is, for convenience, often referred to as *irrtümliche Eigengeschäftsführung* (i.e. erroneous administration of one's own affair).²⁵⁷ In such cases, the provisions relating to *Geschäftsführung ohne Auftrag* do not apply.²⁵⁸ As said above, this is because there is no intention to administer the affairs of another.²⁵⁹ This does not mean, however, that someone who administers the affair of another in the erroneous belief that he is administering his own affair is without a remedy. While the two examples mentioned here are covered by special provisions of the BGB,²⁶⁰ an enrichment action would also be available in other circumstances according to the normal rules of enrichment liability.²⁶¹ Where someone administers the affairs of another under the impression that they are his own, he obviously cannot *consciously* increase the other's patrimony. As there can be no *Leistung* unless the performing party consciously increases the estate of another, the appropriate enrichment remedy cannot be a *Leistungskondition*.²⁶² The performing party would accordingly have to sue with a *Nichtleistungskondition*.²⁶³ Should the performing party culpably cause damage in carrying out another's affairs, the latter may claim for delictual damages.²⁶⁴ Similarly, the person whose affairs are managed may sue the other party for enrichment in certain circumstances. These (enrichment and delictual) claims will be excluded, however, if the administration relates to a thing owned by the 'dominus', and the 'gestor' is what we would call a *bona fide possessor* (i.e. where he possesses a thing owned by another in the belief that he is entitled to that possession).²⁶⁵

jemand ein fremdes Geschäft in der Meinung besorgt, daß es sein eigenes sei.' ('The provisions of §§ 677 to 686 do not apply where someone carries out the affair of another in the belief that it is his own.')

²⁵⁴ For these examples, see Medicus *Schuldrecht II* marg note 611.

²⁵⁵ In other words, a *bona fide* possessor: see § 987 ff BGB.

²⁵⁶ See § 2018 ff BGB.

²⁵⁷ See, e.g., *Palandt* § 687 marg note 1; Brox and Walker (n 79) marg note 383.

²⁵⁸ § 687 (1) BGB; Medicus *Bürgerliches Recht* marg note 416; *idem* *Schuldrecht II* marg note 611; Brox and Walker (n 79) marg note 383. Also refer to note 253 above.

²⁵⁹ § 687 (1) BGB, and see Medicus *Schuldrecht II* marg note 611.

²⁶⁰ Namely § 987 ff and § 2018 ff BGB.

²⁶¹ § 812 ff. See Medicus *Schuldrecht II* marg note 611; *idem* *Bürgerliches Recht* marg note 416.

²⁶² See Chapter One at p 38 above.

²⁶³ Medicus *Schuldrecht II* marg note 611. The relevant *Nichtleistungskondition* would be an *Eingriffskondition*: on the *Eingriffskondition*, see Chapter One at pp 24 and 30 above.

²⁶⁴ In terms of § 823 ff BGB: see Medicus *Schuldrecht II* marg note 611. Also cf Medicus *Bürgerliches Recht* marg note 416, where he says that delictual liability would arise in cases of 'schuldhaftem Irrtum' i.e. 'culpable error'.

²⁶⁵ Medicus *Bürgerliches Recht* marg note 416.

The second species of *unechte Geschäftsführung ohne Auftrag* arises where someone carries out another's administration, with the knowledge that it is not his own affair but that of the other, but without the intention of doing it for the other party.²⁶⁶ For example, a thief steals a car, has it painted and then sells it. He knows that having a car painted and sold are the concerns of the owner, but he intends to do them for himself.²⁶⁷ This situation is sometimes labelled *Geschäftsanmaßung* (which may be loosely translated as 'usurpation of a transaction or affair' or 'taking over a transaction or affair').²⁶⁸

The relevant provision of the BGB (§ 687 (2))²⁶⁹ does not specifically mention the intention of the *gestor*. It merely says that someone must have treated the affair of another as his own, with the knowledge that he was not entitled to do so. This has been interpreted, however, as denoting a situation where, despite knowing that he had no right to treat the affair as his own, the *gestor* does not intend to administer the affair as that of another (i.e. he does not have the *Fremdgeschäftsführungswille*), but carries it out primarily for his own benefit.²⁷⁰ In other words, his motive in ostensibly helping another is really to help himself.

As said above, German law employs a presumption in an attempt to resolve some of the practical difficulties involved in proving whether the *Fremdgeschäftsführungswille* is present or not.²⁷¹ It will be recalled that this intention will be presumed if the relevant affair is 'objectively that of another'. Thus, for example, if someone performs in terms of the obligation of another, it will be presumed that he intended to do so for the benefit of the other party.²⁷²

²⁶⁶ § 687 (2) BGB: 'Behandelt jemand ein fremdes Geschäft als sein eigenes, obwohl er weiß, daß er nicht dazu berechtigt ist, so kann der Geschäftsherr die sich aus den §§ 677, 678, 681, 682 ergebenden Ansprüche geltend machen. Macht er sie geltend, so ist er dem Geschäftsführer nach § 684 Satz 1 verpflichtet.' ('If a person treats the matter of another as his own, although knowing that he is not entitled to do so, the principal may enforce the claims based on §§ 677, 678, 681, 682. If he does enforce them, he is liable to the manager as provided for in § 684 sent. 1.') (translated by Forrester *et al* (n 23)). Also see *Palandt* § 687 marg note 2.

²⁶⁷ This example is taken from Medicus *Schuldrecht II* marg note 613.

²⁶⁸ See, e.g., Medicus *Schuldrecht II* marg note 613. It is also variously called 'angemaßte Geschäftsführung ohne Auftrag' (see, e.g., Kropholler *BGB* vor § 677 marg note 5), or 'angemaßte Eigengeschäftsführung' (see, e.g., *Palandt* § 687 marg note 2) or 'unerlaubte Eigengeschäftsführung' (Brox and Walker (n 79) marg note 384).

²⁶⁹ For a translation, see note 266 above.

²⁷⁰ See *Palandt* § 687 marg note 2.

²⁷¹ See p 82 above, and the references cited there.

²⁷² For the view that the wording of § 677 BGB ('für einen anderen') means that the *gestor*

Practically, this means that if someone administers an affair that clearly falls within another's domain and all the other requirements are satisfied, there is a presumption in favour of genuine *negotiorum gestio* and against non-genuine *negotiorum gestio*.

In what circumstances, then, will *Geschäftsanmaßung* arise? The scope of application of § 687 (2) BGB has been limited, by interpretation, to cases where the affair is 'objectively that of another'.²⁷³ The reasoning behind this is that one can only be *aware* that an affair is that of another, as required by the wording of the provision, if it is objectively²⁷⁴ that of another.²⁷⁵ This leads one to conclude that, in order to show that a case falls within the ambit of § 687 (2), the presumption that the *gestor* had the *Fremdgeschäftsführungswille* would have to be rebutted.²⁷⁶ This means that someone who performs the obligation of another will only be limited to suing for enrichment if there is clear proof that he intended thereby to benefit himself.²⁷⁷

Where the requirements for *Geschäftsanmaßung* have been met, there are at least four potential sources of liability: the law dealing with the relationship between an owner and a possessor,²⁷⁸ the law of delict, the law of enrichment,²⁷⁹ and the law of unauthorised administration.²⁸⁰

If the two parties stand in a relationship of owner and possessor, the 'dominus' may have certain rights against the 'gestor' (possessor).²⁸¹ The 'dominus' can also sue the 'gestor' for delictual damages if the requirements for a delict are

should intend that any advantages arising from the *gestio* should fall to the *dominus*, see, for example, Brox and Walker (n 79) 362.

²⁷³ See Medicus *Bürgerliches Recht* marg note 409; *Palandt* § 687 marg note 2; Brox and Walker (n 79) marg note 382.

²⁷⁴ And not merely subjectively that of another.

²⁷⁵ Medicus *Bürgerliches Recht* marg note 409. As explained above (at p 82), an affair that is objectively neutral (i.e. not objectively that of another) only becomes subjectively that of another through the will of the *gestor*. The argument is thus that one cannot be aware of a situation that is itself brought about by one's own state of mind.

²⁷⁶ See Brox and Walker (n 79) marg note 363: 'für die Annahme, dass hier ausschließlich ein Eigengeschäft geführt werden soll, müssen schon besondere Umstände vorliegen.' ('[S]pecial circumstances must exist for the acceptance that an affair is to be carried out exclusively as one's own'). This obviously also applies to the situation of *irrtümliche Eigengeschäftsführung* but I have mentioned it here in order to facilitate comparison with the South African law later.

²⁷⁷ See, e.g., Kropholler *BGB* § 687 marg note 3.

²⁷⁸ § 987 ff BGB.

²⁷⁹ § 823 ff BGB.

²⁸⁰ See Medicus *Schuldrecht II* marg note 613.

²⁸¹ See § 987 ff BGB and Medicus *Schuldrecht II* marg note 613.

satisfied.²⁸² Even if the 'dominus' cannot prove all the elements of a delict,²⁸³ however, he will be entitled to damages according to the provisions relating to *Geschäftsführung ohne Auftrag*. The 'dominus' may thus demand compensation from the 'gestor' in respect of any damage arising from the administration provided that the administration was against his wishes and the 'gestor' should have known this.²⁸⁴ It is not necessary to prove fault in order to claim these damages.²⁸⁵ In addition, the 'gestor' must give the 'dominus' any profits that he obtained as a result of the administration of the latter's affairs.²⁸⁶ If the 'dominus' enforces these claims (i.e. to the payment of damages and the handing over of profits),²⁸⁷ the 'gestor' in turn may sue him for enrichment.²⁸⁸ The enrichment action in question would be an *Aufwendungskondition*:²⁸⁹ the 'gestor' may claim reimbursement of his expenses (*Aufwendungen*), but his claim is limited to the amount by which the 'dominus' remains enriched. In practice, all that would happen would be that the 'gestor' would subtract his expenses from the profits to be disgorged to the 'dominus'.²⁹⁰ In certain circumstances, on the other hand, it is the 'dominus' who can sue for enrichment. Thus, for example, if, in the course of the administration, there has been a valid transfer of ownership to a third party, the special *Eingriffskondition* in terms of § 816 BGB²⁹¹ would be available. For example, A borrows B's car and then sells

²⁸² For these requirements, see § 823 ff BGB.

²⁸³ E.g. fault.

²⁸⁴ See § 678 read with § 687 (2) BGB. Also see Medicus *Bürgerliches Recht* marg note 417.

²⁸⁵ As Medicus says (in *Bürgerliches Recht* marg note 417), '[n]obody will easily be able to believe that he is allowed to take care of the affairs of another for himself without fault'.

²⁸⁶ §§ 687 (2), 681 sent 2, 667. Also see Medicus *Bürgerliches Recht* marg note 418. It should be noted that the 'gestor' is thus potentially liable for more than he would be according to § 816 (1) sent 1 BGB. This amounts to saying that the 'dominus' can put the (usually *mala fide*) 'gestor' in the position he would have been in had he carried out the transaction *bona fide* for the 'dominus'; in other words, he must at least perform what he would have had to perform had he acted *bona fide*: see Medicus *Schuldrecht II* marg note 613.

²⁸⁷ § 687 (2) sent 2. See note 266 above for the text of this provision.

²⁸⁸ See § 687 (2) sent 2, read with § 684 sent 1 BGB. § 684 sent 1 BGB reads thus: '[Herausgabe der Bereicherung] Liegen die Voraussetzungen des § 683 nicht vor, so ist der Geschäftsherr verpflichtet, dem Geschäftsführer alles, was er durch die Geschäftsführung erlangt, nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung herauszugeben.' ('If the requirements of § 683 are not satisfied, the 'dominus' is obliged to give the 'gestor' everything that he received through the administration, according to the provisions dealing with the restitution of unjustified enrichment.') See Medicus *Bürgerliches Recht* marg note 419 for a description of the 'juristic merry-go-round' ('juristische Karussell') caused by the wording of these provisions.

²⁸⁹ See Chapter One at p 24 above.

²⁹⁰ Medicus *Bürgerliches Recht* marg note 419.

²⁹¹ See Chapter One at p 30 above. § 816 BGB reads as follows: '[Verfügung eines Nichtberechtigten] (1) Trifft ein Nichtberechtigter über einen Gegenstand eine Verfügung, die dem Berechtigten gegenüber wirksam ist, so ist er dem Berechtigten zur Herausgabe des durch die Verfügung Erlangten verpflichtet. Erfolgt die Verfügung unentgeltlich, so trifft die gleiche Verpflichtung denjenigen, welcher auf Grund der Verfügung unmittelbar einen

it to C. Assuming that C is *bona fide*, he will acquire ownership of the car.²⁹² In such a case, the ‘dominus’ (B) can bring an *Eingriffskondiktion* against A for whatever A has received in exchange for the car. In other cases, the ‘dominus’ could bring the general *Eingriffskondiktion*.²⁹³

How does all of this relate to performance of the obligation of another? It will be recalled that in order for someone to perform in terms of another’s obligation in terms of German law, the performing party must make the performance with the intention of settling the debt for the debtor,²⁹⁴ and that if he makes the performance thinking that he is performing in terms of his own obligation, the obligation will not be extinguished and the debtor will remain bound.²⁹⁵ The first variety of *unechte Geschäftsführung ohne Auftrag* (the so-called *Eigenleistung*) could therefore not arise in the situation presently under consideration²⁹⁶ viz where A performs in terms of B’s obligation to C and thereby extinguishes it. (Hence the question mark in the above diagram).

The same cannot be said for the second type of *unechte Geschäftsführung ohne Auftrag*, namely *Anmaßung* (where someone administers what he knows is the affair of another, but does so for himself). In such circumstances, A can settle B’s debt to C.²⁹⁷ Thus, for example, we can imagine that a busy businessman, Brian, telephones a garage called ‘Cars To Go’ and arranges for his car to be collected and serviced. A regular customer of the garage, he says that he will send someone to

rechtlichen Vorteil erlangt. (2) Wird an einen Nichtberechtigten eine Leistung bewirkt, die dem Berechtigten gegenüber wirksam ist, so ist der Nichtberechtigte dem Berechtigten zur Herausgabe des Geleisteten verpflichtet.’ ([Disposition by person without title] (1) If a person without title to an object makes a disposition of it which is binding upon the person having title he is bound to hand over to the latter what he has obtained by the disposition. If the disposition is made gratuitously the same obligation is imposed upon the person who acquires a legal advantage directly through the disposition. (2) If an act of performance is done for the benefit of a person not entitled thereto, which is effective against the person entitled, the former is bound to hand over to the latter the value of such performance.’ (translated by Forrester *et al* (n 23)).

²⁹² See § 932 ff BGB and Chapter One above at p 18 ff.

²⁹³ In terms of § 812 (1) BGB. See Medicus *Schuldrecht II* marg notes 613 and 708.

²⁹⁴ But his intention is assessed from the point of view of the recipient i.e it is objectively determined: see p 70 above.

²⁹⁵ See p 72 above; Medicus *Schuldrecht II* marg note 721. Because this performance would not free the real debtor, the real debtor would not receive anything and would therefore not be exposed to a *Rückgriffskondiktion* – the performing party could only sue the supposed creditor with a *condictio indebiti*: see Medicus *loc cit* and p 150 below.

²⁹⁶ See the text to note 77 above. Also see p 148 ff below.

²⁹⁷ In this regard, it should again be borne in mind that A’s intention to settle B’s debt to C is typically determined objectively i.e it is C’s perspective that is decisive: see p 70 above and Chapter One at p 40.

collect the car, as is his usual practice. A garage attendant duly collects the car and it is serviced at the garage's premises. Later in the day, Alexander arrives at the garage and says that he is one of Brian's employees and that he has come to pay Brian's bill and to collect the car. Thinking that everything is in order, the garage attendant accepts payment and hands over the car. Alexander is not Brian's employee, but a thief. He intends to settle Brian's debt to the garage, but only so that he will be able to gain possession of the car. In the circumstances, it seems that Alexander will have validly settled Brian's debt to the garage, which acted *bona fide*.

In such circumstances, Brian might have claims in terms of the law of delict and the law relating to the relationship between owners and possessors. In addition, if Alexander has sold the car to a *bona fide* purchaser, Brian can bring an *Eingriffskondiktion* against Alexander for the purchase price in terms of § 816 BGB. Alexander can bring an *Aufwendungskondiktion* against Brian for his expenses (i.e. settling the debt to the garage). As it is an enrichment action, he can only claim for any amount by which Brian remains enriched. Alexander can also only raise this claim if Brian enforces his own claims against Alexander.

(c) *Geschäftsführer (gestores) who lack full capacity*

German writers generally do not deal with situations where one of the parties lacks capacity as a special category or subspecies of *Geschäftsführung ohne Auftrag*.²⁹⁸ In order to facilitate comparison with South African law, however, the rules concerning such cases will here be dealt with as if they fall into a separate category.

In terms of German law, any lack of capacity on the part of the *dominus* is apparently legally insignificant for the purposes of *Geschäftsführung ohne Auftrag*. A valid relationship of *Geschäftsführung ohne Auftrag* can thus arise, for example, where a *gestor* administers the affairs of someone who is insane or a minor or otherwise incapacitated.

²⁹⁸ Such cases apparently do not fall within the categories of either *unberechtigte* or *unechte Geschäftsführung ohne Auftrag*; see, e.g., Medicus *Schuldrecht II* marg note 627 and *Bürgerliches Recht* marg note 426, where he deals with such cases under the heading of *berechtigte Geschäftsführung ohne Auftrag* (but also cf. the schematic representation in *Bürgerliches Recht* marg note 435).

The lack of capacity of the *gestor* affects only the claims of the *dominus*. The *dominus*'s claim against a *gestor* (i.e. a claim for damages, or for the proceeds of the administration) will be limited to the extent of the latter's enrichment in situations where the *gestor* lacks capacity, or has only limited capacity. Such a *gestor* will therefore not incur the same liability as other *gestores* under *berechtigte Geschäftsführung ohne Auftrag*,²⁹⁹ according to § 682 BGB, he will only be liable in terms of the law of delict and the law of unjustified enrichment.³⁰⁰ The claims of a *gestor* who lacks capacity against a *dominus* are not, however, limited to the extent of the latter's enrichment.³⁰¹ In other words, if A, who lacks full capacity, settles B's debt to C, and A wants to sue B for his expenses, A would be treated like any other plaintiff in such circumstances. If, however, A had made a profit from the transaction, or had caused loss to B, B could only sue A for the amount by which A was enriched.

(d) Synthesis

At first sight, the main difference between the German *unechte* (non-genuine) *Geschäftsführung ohne Auftrag* and *unberechtigte* (unjustified) *Geschäftsführung ohne Auftrag* seems to be that the *unechte* variant requires a primarily subjective enquiry, whereas the *unberechtigte* variant is established primarily by means of an objective enquiry. In other words, the identifying feature of the *unechte Geschäftsführung ohne Auftrag* is the absence of the necessary intention to carry out the administration for another, and the identifying feature of the *unberechtigte Geschäftsführung ohne Auftrag* is that the administration is not in accordance with the interests or the presumed will of the *dominus*. This statement must immediately

²⁹⁹ See previous footnote.

³⁰⁰ § 682 BGB: '[Fehlende Geschäftsfähigkeit des Geschäftsführers] Ist der Geschäftsführer geschäftsunfähig oder in der Geschäftsfähigkeit beschränkt, so ist er nur nach den Vorschriften über den Schadenersatz wegen unerlaubter Handlungen und über die Herausgabe einer ungerechtfertigten Bereicherung verantwortlich.' ('[Lack of capacity of the *gestor*] If the *gestor* has no capacity or has limited capacity, he is only liable in terms of the provisions on damages for delict and the provisions on disgorgement of unjustified enrichment.') The liability of a *gestor* who acts in a situation of necessity or emergency is also reduced, according to § 680 BGB, which reads: '[Geschäftsführung zur Gefahrenabwehr] Bezweckt die Geschäftsführung die Abwendung einer dem Geschäftsherrn drohenden dringenden Gefahr, so hat der Geschäftsführer nur Vorsatz und grobe Fahrlässigkeit zu vertreten.' ('[*Gestio* to avert a danger] If the purpose of the *gestio* is the averting of an imminent and threatening danger to the *dominus*, the *gestor* is only liable for intentional and gross negligent conduct.')

³⁰¹ See Medicus *Schuldrecht II* marg note 627.

be qualified, however, in that the test for intention is not purely subjective; for example, it will be presumed that the *gestor* had the necessary intention when the affairs were objectively those of another.³⁰² Similarly, the test for whether the administration was 'justified' is not purely objective; for example, *unberechtigte Geschäftsführung ohne Auftrag* may arise where the administration did not accord with the actual will of the *dominus*.³⁰³

As far as the consequences are concerned, both variants give rise to enrichment liability, but to different species of *Nichtleistungskonditionen*: if A performs in terms of B's debt to C in cases of *unberechtigte Geschäftsführung ohne Auftrag*, A (the 'gestor') can sue B with a *Rückgriffskondition*; in cases of *unechte Geschäftsführung ohne Auftrag*, on the other hand, A's action against B would be an *Aufwendungskondition*.³⁰⁴

Enrichment liability also arises if the *gestor* lacks full legal capacity: the other party may not sue him for all the proceeds gleaned from the administration, but only those by which the *gestor* remains enriched. A *gestor* who lacks full capacity may, however, sue for all of his expenses, just as a major could in the circumstances. Whether the *dominus* is incapacitated or not has no impact on the measure of liability.

To sum up, then, if A fulfils B's obligation to C, without mandate or ratification, where he does not intend to do so for B, or where doing so is not in B's interests or against his actual or presumed will, A may recover from B the amount by which B is enriched by A's performance. If A lacks capacity, he will be entitled to recover whatever a major would in the circumstances, but he will only be liable for his enrichment.³⁰⁵

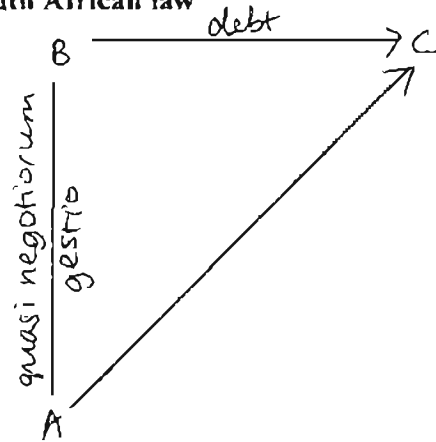
³⁰² See the text to note 130 above.

³⁰³ See p 98 above, and the controversy outlined in note 224 above.

³⁰⁴ Which would only be available if B had enforced his claims to profits and damages against A: see p 105 above.

³⁰⁵ And for compensation for any losses caused by his negligence.

South African law



As already mentioned,³⁰⁶ South African law also imposes liability in certain instances where only some, and not all, of the requirements for *negotiorum gestio* proper are fulfilled: situations of so-called 'quasi negotiorum gestio'. The liability in question is always based on the enrichment of the *dominus*. The *gestor*³⁰⁷ can accordingly sue the *dominus* for his expenses with the 'extended *actio negotiorum gestorum*',³⁰⁸ but he will only be able to recover the amount by which the *dominus* remains enriched by the *gestio*.³⁰⁹

This action is generally regarded as being available where the *gestor* acted *mala fide* for his own benefit, where the *gestor* acted against the express will of the *dominus*, where the *gestor* administered the affairs of a minor,³¹⁰ and where the *gestor* acted in the *bona fide* belief that he was managing his own affairs.³¹¹ Here it should be noted that one of these situations might not arise in the category of cases presently being discussed; a *bona fide* belief on the part of A that the affairs are his own would probably be inconsistent with his intention to discharge B's debt to C,³¹² assuming that such an intention is required.³¹³ Each of the relevant situations will now be dealt with in turn.

³⁰⁶ At p 96.

³⁰⁷ Strictly speaking, the labels *gestor* and *dominus* should not be used here, as there is no relationship of *negotiorum gestio*, properly so-called. It would be clumsy to use the terms *quasi-gestor* and *quasi-domimus* (extrapolated from *quasi negotiorum gestio*), and I will therefore use the terminology used for *negotiorum gestio* proper.

³⁰⁸ Or *actio negotiorum gestorum utilis*: see, e.g., Eiselen and Pienaar *Unjustified Enrichment* xiii and 228.

³⁰⁹ Eiselen and Pienaar *Unjustified Enrichment* 218: or the impoverishment of the *gestor*, whichever is the lesser.

³¹⁰ See Whitty and Van Zyl (n 4) 393 cf Van Zyl *Negotiorum Gestio* 87 (*gestor* or *dominus*).

³¹¹ See Van Zyl *Negotiorum Gestio* 86; Whitty and Van Zyl (n 4) 389 ff.

³¹² Cf notes 63 and 214 above, and the discussion of the *bona fide gestor* at p 142 ff below.

³¹³ See the discussion above at p 67 ff.

(a) **Where a *gestor* acts *mala fide* for his own benefit**

The situation envisaged here occurs when someone administers the affairs of another (e.g. by performing the obligation of another) *sui lucri causa* i.e. for his own benefit. As the 'gestor' does not act with the intention of benefiting another (*animo negotia aliena gerendi*), the case does not fall within the parameters of *negotiorum gestio* proper in South African law. Provided that the remaining requirements are satisfied, however, the performing party will still have a right of recourse against the *dominus*. This claim is based, not on a relationship of *negotiorum gestio*, but on the enrichment of the *dominus*. The performing party's claim for expenses is thus limited to the amount by which the *dominus* is still enriched.

In what circumstances might a party perform another's obligation in his own interests? In *Shaw v Kirby*,³¹⁴ for example, a young man, eagerly anticipating his 21st birthday when he would come into an inheritance, visited his aunt at her hotel in Mafikeng. Intending to become her partner, and apparently feeling (prematurely) affluent, he settled various debts related to the running of the hotel. He did so thinking that he would ultimately benefit by keeping the business afloat. In *Van Staden v Pretorius*,³¹⁵ A purchased a farm from co-owners B and X, and took possession. B and X had an arrangement that, prior to transfer to A, they would exchange their half-shares in this and another property and would consequently each own one property outright. The plan was that once this exchange had taken place, and B became full owner of this farm, he would transfer ownership to A. Several years later, however, the transfer had still not been effected. In the meantime, while A was making various improvements to the farm, B was running into financial difficulties. Eventually B's creditors advertised the sale in execution of the farm. In order to avoid suffering substantial losses, A paid B's debts.³¹⁶

In these and other cases,³¹⁷ the courts held that the so-called *mala fide gestor* had no recourse against the *dominus*. This approach was widely criticised³¹⁸ and, in

³¹⁴ *Supra*.

³¹⁵ *Supra*.

³¹⁶ For the facts, see the judgment at 853.

³¹⁷ E.g. *Bernstein v Taylor* (1888) 5 HCG 258 at 266; *Amod Salie v Ragoon* *supra*. See Van Zyl *Negotiorum Gestio* at 96.

³¹⁸ See Van Zyl *Negotiorum Gestio* 96 ff; De Vos *Verrykingsaanspreeklikheid* 215; W de Vos 'Miskenning van negotiorum gestio' (1965) 28 *THRHR* 229; Eiselen and Pienaar *Unjustified*

the leading case of *Odendaal v Van Oudtshoorn*,³¹⁹ the court rejected these decisions and followed another line of authority,³²⁰ holding that the *gestor* would indeed have recourse against the *dominus* in such circumstances. In this case,³²¹ Odendaal (A) took over the Trek-In Restaurant in Standerton from Van Oudtshoorn (B) and ordered goods from B's supplier, L Suzman Ltd (C). C refused to supply the goods unless A paid debts previously incurred by B. A paid the debts, not because he wanted to assist his predecessor, B, but because he wanted to carry on the business.³²² He thus settled the debts *sui lucri causa*.³²³ Because there was no intention to benefit the other party, the ordinary *negotiorum gestio* action (the *actio negotiorum gestorum contraria*) was not available. After reviewing the authorities, the court said that *Shaw v Kirby*³²⁴ had been wrongly decided and that an action based on enrichment should be allowed. In other words, if A pays B's debt to C for his own benefit, A has a right of recourse based on unjustified enrichment. The court added the proviso, however, that such an action would only lie if the circumstances were such that the *dominus*'s enrichment were 'improper or unjustified'³²⁵ and that the reasonableness of the *gestor*'s behaviour was one of the factors to be considered in deciding this question.³²⁶ The weight of opinion seems to be that the case was correctly decided, although reservations have been expressed regarding the relevance of enquiring whether it was reasonable for the *gestor* to act as he did.³²⁷

Enrichment 232; Scholtens (1969) 86 SALJ 131 at 133-5; J E Scholtens 'Rights of recourse of sureties and third persons who paid another's debt' (1959) 76 SALJ 266.

³¹⁹

Supra.

³²⁰

Prince qq Dieleman v Berrange, alias Anderson (1830) 1 Menz 435 (cf the discussion at p 136 below); *Stoll's Trustee v Kriege and Bosman* (1835) 3 Menz 448. See Van Zyl *Negotiorum Gestio* 97-8. Van Zyl argues that *Harman's Estate v Bartholomew* 1955 (2) SA 302 (N) is also authority for this proposition.

³²¹

For the facts of the case, see the judgment at 435-6.

³²²

At 435H *in fin*.

³²³

See the judgment at 435 G: he 'paid, not with the aim (doel) of benefiting (bevoordeel) B but purely in his own interests'. Also see the judgment at 437A.

³²⁴

Supra.

³²⁵

If it were 'onbehoorlike of ongeregverdigde': 442F.

³²⁶

See the judgment at 442F-G.

³²⁷

See, for example, De Vos *Verrykingsaanspreeklikheid* 215 ('dit [wil] voorkom asof ons regspraak in hierdie verband na die suiwer regsbeginself teruggekeer het.'). Van Zyl *Negotiorum Gestio* at 98-9 (albeit with reservations regarding the court's stipulation that the *gestor* must have acted reasonably in the circumstances); Eiselen and Pienaar *Unjustified Enrichment* at 232, where they suggest that allowing the *gestor* to recover the *dominus*'s enrichment in such circumstances is fair because A could have claimed this sum from B by means of cession of C's action (also see Scholtens (1969) 86 SALJ 131 at 134 for this argument). For criticism of the requirement of reasonableness, also see Scholtens (1969) 86 SALJ 131 at 135. The decision was followed by the Cape Provincial Division of the Supreme Court in *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd supra*. This question will be considered further at p 119 ff below.

The effect of *Odendaal v Van Oudtshoorn* thus appears to be that someone who administers the affairs of another with the intention of benefiting himself can claim from the *dominus* the amount by which the latter has been enriched, provided that such enrichment is unjustified or 'improper' and the *gestor* acted reasonably. The general formulation of the requirements of the extended *actio negotiorum gestorum* has made it an attractive alternative to a general enrichment action, and has led to its use in contexts far removed from *negotiorum gestio* and the policies and values which underpin it.³²⁸ (In this respect, it is perhaps significant that *Odendaal v Van Oudtshoorn*³²⁹ was decided merely two years after *Nortje en 'n Ander v Pool NO.*)³³⁰ In view of the fact that the Supreme Court of Appeal has now reopened the door for the recognition of a general enrichment action,³³¹ it has been argued that the heyday of the extended *actio negotiorum* is drawing to a close; the functions that it has fulfilled will now be fulfilled by a general enrichment action, and there will be no need to stretch the boundaries of the extended action to accommodate cases that really have nothing to do with the ideas behind *negotiorum gestio*.³³²

In this regard, it is interesting to note that although the German Civil Code makes provision for general enrichment liability,³³³ it also expressly makes special provision for a close parallel to our situation of the *mala fide gestor*.³³⁴ This is the so-called *Geschäftsanmaßung*, the second type of non-genuine *negotiorum gestio* (*unechte Geschäftsführung ohne Auftrag*). According to § 687 (2) BGB, someone who treats another person's affair as his own, aware that he is not entitled to do so, may sue the other person for his enrichment in certain circumstances.³³⁵ Although modern writers point out that this is not really a case of *Geschäftsführung ohne Auftrag*, as the crucial intention to administer the affairs of another for the other is missing,³³⁶ and the various cross-references of the BGB starting in § 687 ultimately

³²⁸ See Whitty and Van Zyl (n 4) 394 ff. The fact that an extended *actio negotiorum gestorum contraria* can also be used to claim a *factum* (i.e. a plaintiff does not have to prove that a *datio* took place) also makes it attractive as an alternative to the *condictiones*.

³²⁹ *Supra*.

³³⁰ 1966 (3) SA 96 (A), with its restrictive approach towards what constitutes 'enrichment' and its rejection of a general basis of enrichment liability.

³³¹ In *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA).

³³² Whitty and Van Zyl (n 4) 395-6.

³³³ In § 812 ff BGB.

³³⁴ In § 687 (2) BGB.

³³⁵ He is entitled to an enrichment action provided that the *dominus* has enforced his own claims against the *gestor*: see p 105 above.

³³⁶ See, e.g., *Palandt* § 687 marg note 2; *Medicus Bürgerliches Recht* marg note 406, 416.

lead one to the general enrichment provisions,³³⁷ it is perhaps significant that the 'gestor's' claim occupies one of the special niches carved out of the general enrichment liability by von Caemmerer: the *Aufwendungskondition*, or 'expenditure action'.³³⁸ This suggests that, although the result may be the same as in any other enrichment case (viz that the enriched party must give up his gains), there is something to be said for dealing with it as a special case of enrichment liability. This should be borne in mind in evaluating the requirements of the extended action of the *mala fide gestor* in South African law.

The requirement that has received the most attention in South Africa is the gestor's intention. This, after all, is the pivotal factor in deciding whether a particular situation is one of *negotiorum gestio* proper, in which case the gestor can claim all his expenses, or one of *quasi negotiorum gestio*, in which case he is limited to an enrichment claim. In other words, like German law, South African law regards the gestor's state of mind as being crucial in deciding to what extent to condone his interference in the affairs of another.

First it must be pointed out that although the gestor who acts for his own benefit is commonly called the *mala fide gestor*,³³⁹ our case law does not demand *mala fides* in the sense that the gestor should have acted in a way that is hostile to the interests of the *dominus*. He will be acting *mala fide* merely by virtue of the fact that he 'knowingly ... undertakes the management of another's affairs, not with the *animus negotia aliena gerendi*, but with the intention of benefiting himself (*sui lucri causa*)'.³⁴⁰

It is implied, though not always stated, that what is relevant is the gestor's subjective intention.³⁴¹ Of course, proving a subjective state of mind is always

³³⁷ § 687 (2) refers one to § 684 sent. 1, which in turn directs one to the enrichment provisions of § 812 ff.

³³⁸ See Chapter One at p 24 in this regard.

³³⁹ See, e.g., Eiselen and Pienaar *Unjustified Enrichment* at 228; Van Zyl *Negotiorum Gestio* 90; *Maritime Motors (Pty) Ltd v Von Steiger and Another supra*. Cf De Vos, who does not mention *mala fides* at all (in *Verrykingsaanspreeklikheid* at 215) and Odendaal's case *supra*, where there is also no mention of *mala fides*.

³⁴⁰ Van Zyl *Negotiorum Gestio* at 90. Thus a farmer who puts out a fire on his neighbour's land in order to prevent his own crops catching alight, will be acting *mala fide* and his claim for any expenses incurred in extinguishing the flames will be limited to the extent that the neighbour was enriched by these actions.

³⁴¹ But see Van Zyl *Negotiorum Gestio* at 31.

difficult, but our law does not shy away from requiring it in various other contexts. There could be particular difficulties in this context, however. The *gestor* wants to claim his expenses. The *dominus*, on the other hand, will at the very least try to limit the *gestor*'s claim to the amount by which he (the *dominus*) is enriched. In order to claim all his expenses, the *gestor* will have to prove that all the requirements of *negotiorum gestio* are satisfied, including that he intended to benefit the *dominus*. He will have to prove his intention by reference to objective circumstances.³⁴² The *dominus*, on the other hand, could argue that the *gestor* did not intend to benefit him, but to act in his own interests. The only way he can prove what the *gestor*'s intention was is by bringing circumstantial evidence, including evidence as to any actual benefit that ensued. A court thus has to decide what the *gestor* subjectively intended by referring to the objective circumstances, and the most important of these must surely be whether a benefit resulted or not, and whether this benefit accrued to the *dominus* or the *gestor*. The relationship between the *gestor*'s intention and the *dominus*'s interests has not been clarified by the courts,³⁴³ but it is difficult to imagine a case where a court would hold that someone intended to act *animo negotia aliena gerendi* in circumstances where the *gestio* in question was objectively solely in the *gestor*'s own interests. German law does not provide any assistance in this regard. While the *Fremdgeschäftsführungswille* will be presumed in cases where someone administers what is objectively the affair of another (including performance of another's obligation), a case of *Geschäftsanmaßung* can only arise where there is clear proof to the contrary.³⁴⁴ In other words, as in South African law, it must be proven that the *gestor* intended to carry out the affair for himself.

What exactly must the content of the *gestor*'s intention be? It is clear that if the *gestor* intends purely to benefit the *dominus*, there will be a situation of *negotiorum gestio*. It is also clear that if he intends only to benefit himself, his case would fall within the scope of *quasi negotiorum gestio*. But what happens where his motives are mixed? In other words, would a farmer who puts out a fire on a neighbour's farm be allowed an *actio negotiorum gestorum contraria* or would he be confined to its extended version if he were prompted not only by good neighbourliness but also by his own interests? Or, more pertinently, how would the

³⁴² See Van Zyl *Negotiorum Gestio* at 31.

³⁴³ Cf the discussion at p 86 ff above, concerning the requirement that the administration be *utiliter coeptum*.

³⁴⁴ See pp 82 and 103 above.

law regard someone who pays the debt of another with the genuine intention to help the debtor, but also with the awareness that he himself stands to benefit from doing so?

In German law, all that has to be proven for a case to fall within the scope of *Geschäftsanmaßung* is that the administration was *primarily* in the interests of the 'gestor'.³⁴⁵ South African law is not as clear. It seems to say that in cases where the *gestor* intends to benefit both himself and the *dominus*, he can nevertheless sue for his expenses.³⁴⁶ He will thus be confined to an enrichment claim only where he intended solely to benefit himself.

The law thus appears to say that if someone's motives are at least partly altruistic,³⁴⁷ it is fair for him to claim reimbursement for any costs he has incurred. If his motives are purely selfish, on the other hand, he can still sue the *dominus*, but only for the *dominus*'s gain, and he must bear the risk that the *dominus* was either not enriched or that he might have lost any enrichment he did receive. This implies that the law discourages meddling in the affairs of another for self-interest, but only by possibly³⁴⁸ reducing the *quantum* of the *gestor*'s claim. Looking at the situation from the *dominus*'s point of view, why should he not be allowed to keep whatever he has received as a result of someone's self-interested interference in his affairs without his consent? Allowing him to retain what he has received in such circumstances seems to 'compensate' him for the encroachment into his private sphere by the *gestor*. From the *gestor*'s point of view, the *dominus*'s enrichment in such circumstances seems merely coincidental (where the *gestor*'s primary aim was to benefit himself). Why should the *gestor* be allowed to take advantage³⁴⁹ of the fact that his interference in the affairs of another in furtherance of his own interests has actually resulted in a benefit to that party? To allow the *gestor* a claim in such circumstances seems to tip the balance too much in favour of the *gestor*, if the situation is considered from the perspective of the values underlying *negotiorum*

³⁴⁵ See *Palandt* § 687 marg note 2.

³⁴⁶ See, e.g., Zimmermann *Law of Obligations* 433; Whitty and Van Zyl (n 4) 373. But cf. earlier cases, e.g., the comments of Innes CJ in *Amod Salie v Ragoon* *supra* at 103: the *gestor* must not act 'with a view to benefit himself in any way'.

³⁴⁷ In the limited sense explained above at p 76.

³⁴⁸ The measure of the expenses and the enrichment might be the same, especially where someone has paid the debt of another.

³⁴⁹ I.e. by suing the *dominus* for enrichment.

gestio. It should be remembered, however, that the law is not only concerned with steering a middle course between the values of altruism³⁵⁰ and autonomy. It is also concerned with preventing situations of unjustified enrichment, and this seems to be the true rationale for the rule allowing the *mala fide gestor* a claim. In other words, the *dominus* should not be out of pocket due to the *gestor*'s interference, but he should also not be allowed to profit from it.

The next issue is what is meant by 'benefit' in this context. Must the benefit be one which is measurable in financial terms, or would it suffice if the *gestor* intended a non-pecuniary benefit (to another, in the case of *negotiorum gestio* proper, or to himself, in the case of *quasi negotiorum gestio*)? Would a *gestor* succeed in claiming his expenses if he could show that he performed the obligation of another with the intention of preserving that person's reputation (e.g. to stave off bankruptcy), or could he bring an enrichment claim if he proved that he did so with the intention of boosting his own image as a benefactor? The recent case of *Maritime Motors (Pty) Ltd v Von Steiger*³⁵¹ suggests that a *gestor* who intends to protect his reputation acts *mala fide* and can therefore not rely on the *actio negotiorum gestorum contraria*.³⁵² It appears, therefore, that even an intention to benefit oneself in a non-pecuniary way can shift a case from the province of *negotiorum gestio* proper to that of *quasi negotiorum gestio*. This implies that any kind of selfish motive makes enrichment in such circumstances unjustified.

Finally, how does the *gestor*'s intention to benefit relate to the law on extinction of the debts of another? According to one formulation of the requirements for the payment of another's debt, as discussed above,³⁵³ the paying party should have the intention to settle the other's debt. For the former party (A) to bring an enrichment claim against the latter (B), under the heading of *quasi negotiorum gestio*, A would have to prove that he intended to settle B's debt, but also that he was acting *sui lucri causa*. (In other words, he must show that he intended to perform in

³⁵⁰ It must also be remembered that the 'intention to benefit the *dominus*' only implies a motive of limited altruism; if the *gestor*'s motives are purely altruistic (i.e. he intends to help the *dominus* without any *quid pro quo*), he cannot claim his expenses as he will have made a donation, and not acted as a *negotiorum gestor*.

³⁵¹ *Supra*.

³⁵² At 600B.

³⁵³ See p 67 ff.

terms of B's obligation for his own benefit.)³⁵⁴ If, on the other hand, as some writers seem to suggest,³⁵⁵ extinction of an obligation by someone other than the debtor requires that the performing party not only intend to perform the debtor's obligation but that he does so with the intention of *benefiting* the debtor, the debt will not be discharged i.e B will not be enriched but C will. As was argued above,³⁵⁶ the approach of the court in *Odendaal*'s case seems to suggest that the 'intention to benefit' is not required in order to settle a debt.

As said above, although the *gestor*'s intention occupies central stage, there are other requirements that must be met before a plaintiff can succeed with an extended *actio negotiorum gestorum* in South African law. He must accordingly prove that the *dominus* was enriched by the administration,³⁵⁷ and that this enrichment was unjustified, in the sense that it took place without legal ground.³⁵⁸ It is also implied, but not usually stated, that the affairs administered must objectively be those of another, for *quasi negotiorum gestio* to arise.³⁵⁹

The enrichment in question need not be by way of a *datio*, as required for most of the *condictiones*,³⁶⁰ it could thus be a *factum*. In our context, the enrichment would result from the extinction of a liability; if A performs to C in terms of an obligation B–C, and such performance extinguishes B's liability to C, B would be enriched. A question that has not generally been considered in this context is whether A must have been correspondingly impoverished.³⁶¹ In other words, must the *dominus*'s enrichment be at the *gestor*'s expense? In most cases where a third

³⁵⁴ See the remarks in note 214 above.

³⁵⁵ See note 48 above.

³⁵⁶ At p 71.

³⁵⁷ See *Du Preez v Boetsap Stores (Pty) Ltd supra* at 181H, where the court said that the plaintiff had to prove that the defendant had been enriched 'and that *onus* is not discharged merely by proving that specific amounts were disbursed, more especially since plaintiff alleges that he acted in his own interests.'

³⁵⁸ Thus *negotiorum gestio* and *quasi negotiorum gestio* will both be excluded if the act/s in question took place in terms of a contract of mandate (cf, e.g., *Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1997 (3) SA 300 (T) at 313G-I and *Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T)). And *quasi negotiorum gestio* (and consequently enrichment liability) will be excluded if all of the requirements of *negotiorum gestio* are met.

³⁵⁹ Thus the extended action is inappropriate where the performing party was in fact administering his own affairs. Cf the discussion of banking cases in Chapter Three below.

³⁶⁰ See Chapter One at p 7 ff.

³⁶¹ This question does not arise in German law, as the wording of § 812 BGB only requires that someone 'erlangt etwas' (i.e. receive something) – there is no general requirement of impoverishment. See Chapter One at p 42 in this regard.

party performs the obligation of another, the one party's impoverishment would equal the other's enrichment. If B owes R1 000 to C, and A pays R1 000 to C, there is no difference between A's loss and B's gain (at least in financial terms). Situations could arise, however, where the enrichment exceeds the impoverishment. For example, B is abroad for several months and A pays the annual fee for B's television licence which falls due during B's absence. The broadcasting company has a 'competition' to encourage licence-holders to pay their fees, and arbitrarily awards prizes to some of those who pay timeously. As B's fees are paid promptly, B wins a valuable prize. Here, B's enrichment (the loss of a liability and the gain of a prize) exceeds A's impoverishment. The general approach of South African law is to require the impoverishment of a plaintiff in an enrichment action³⁶² and to limit the measure of his claim to whichever is the lesser: his impoverishment or the defendant's enrichment. It is probable that these general rules also apply within the context of payment of the debt of another and *quasi negotiorum gestio*.

Finally, the provisos mentioned by the court in *Odendaal v Van Oudtshoorn* must be considered. The court said that the *gestor* would only have a claim if the *dominus*'s enrichment were 'improper or unjustified' and that the reasonableness of the *gestor*'s behaviour was one of the factors to be considered in deciding this question.³⁶³ In using the word 'unjustified' in this context, the court seemed not merely to be referring to an absence of a valid legal ground, but to something broader i.e. a lack of justification on the grounds of fairness or other policy considerations.

Although this has been criticised by academics, the approach of the courts still appears to be that the extended *actio negotiorum gestorum* can be refused where allowing it would lead to an unfair result.³⁶⁴ Thus, where A settles B's debt to C in circumstances where the debt was about to prescribe, it would be unfair to expect B to have to pay A the amount by which he was enriched (i.e. the amount of the debt).

³⁶² Cf the approach in German law: see Chapter One at p 42.

³⁶³ See the judgment at 442F-G.

³⁶⁴ See, e.g., the *obiter* comments of the AD in *B & H Engineering v First National Bank of South Africa Ltd supra* at 295B: 'Thus a bank might have paid a debt which was on the point of being prescribed, or it might have paid while the parties were negotiating to reduce the debt, etc. Moreover, in exceptional circumstances the drawer may have an interest in not having the debt paid. In such cases a court may conceivably hold that, even if the drawer were enriched, the bank would not in equity be entitled to restitution.' Cf the comments of Whitty and Van Zyl (n 4) 392-3, quoted below at p 127, which seem to imply (in the context of a protesting debtor) that a substitution of creditors is not a serious matter.

There might also be circumstances where A performs in terms of B's obligation to C in order to improve A's bargaining position vis-à-vis B. For example, A might want to buy land from B, who is reluctant to sell it. If A were assured of an enrichment action in all cases where he administered B's affairs *sui lucri causa*, A could then pay B's debts to C, acquire a claim against B, and use this to 'persuade' B to sell him the land he wants.³⁶⁵ In my opinion, measuring the *gestor*'s behaviour against an objective standard, such as reasonableness, and considering the interests of the *dominus* would provide the safeguards necessary to prevent inequitable results.³⁶⁶

The riders added by the court may also be explained in a slightly different way. The statement of the court seems to echo some of the formulations of the requirement that the administration of the affairs of another be *utiliter coeptum*.³⁶⁷ It certainly gives expression to the thinking behind the *utiliter*-requirement: interference in the affairs of another will only be condoned in circumstances which make it acceptable³⁶⁸ according to our *boni mores*. It could thus be argued that, in effect, the court was saying that where someone manages the affairs of another *sui lucri causa*, such management must nevertheless be *utiliter* for him to have the limited legal relief provided by the extended action. In other words, moving from the domain of *negotiorum gestio* proper into that of *quasi negotiorum gestio* does not mean that *all* of the requirements of *negotiorum gestio* are abandoned. Thus a *mala fide gestor* need not prove that he acted with the intention to benefit the *dominus*, but he must satisfy all the other requirements of *negotiorum gestio* in order to recover those expenses by which the *dominus* remains enriched. The appropriateness of posing the *utiliter*-requirement in the context of an enrichment action might be debatable, but I think that the court's proviso serves a useful function in preventing cases of injustice and should therefore be retained in some form.

While South African law balances the interests of the parties by requiring that the *mala fide gestor* act reasonably (and the resultant enrichment not be 'improper'), German law provides a counterweight to the enrichment remedy of the *mala fide*

³⁶⁵ Cf Medicus's example cited at p 100 above.

³⁶⁶ Cf Whitty and Van Zyl (n 4) 396, who argue that the requirement of *negotiorum gestio* proper that the *gestor* act with an altruistic motive constitutes a safeguard that is absent in cases of *quasi negotiorum gestio*. They suggest that safeguards are necessary, but do not discuss what safeguards might be appropriate.

³⁶⁷ See pp 86-7 above.

³⁶⁸ Or justifiable, or excusable.

gestor by stipulating that it will only be available to him if the ‘dominus’ has enforced his claims to the proceeds of the administration and compensation for any damage caused by the *gestor*.³⁶⁹ If the *dominus* does not sue, the *mala fide gestor* will be without a remedy. If, on the other hand, the *dominus* does sue, the *mala fide gestor*’s claim will be set off against that of the *dominus*. In a sense, the action of the *mala fide gestor* in German law is thus only conditional; like its South African equivalent, it is subject to a proviso. It is interesting to note that South African writers on *negotiorum gestio* do not generally discuss the position of the party whose affairs have been managed by a *mala fide gestor*.³⁷⁰ Perhaps the fact that the rights of such a *dominus* have not been clearly set out has also contributed to the court’s reluctance to discard the provisos attached to the action of the *mala fide gestor*.³⁷¹

(b) **Where a gestor acts domino prohibente**

The question whether a party (A) who manages the affairs of another (B) against his express wishes is entitled to an action against the *dominus* has long been a vexed one.³⁷² Even in Roman law, the question was disputed until Justinian ruled out an action in such circumstances.³⁷³ Martinus, one of the *quattuor doctores*, suggested that it should be permitted. Subsequent lawyers who considered the question fell into two camps; some adhering to the Roman position;³⁷⁴ others, some very influential, following the lead of Martinus.³⁷⁵ In South Africa, while the earliest decisions apparently disallowed an action,³⁷⁶ an action was granted to the *gestor*

³⁶⁹ *Palandt* § 687 marg note 4; BGHZ 39, 186.

³⁷⁰ This is probably a reflection of the general emphasis, in modern legal systems, on the *gestor*’s remedies rather than those of the *dominus* in the context of *negotiorum gestio* proper. In this regard, see Zimmermann *Law of Obligations* 443.

³⁷¹ Although it is probably also fair to say that the *dominus* can sue the *mala fide gestor* if the requirements of the law of delict are satisfied (but cf the no-fault liability of the *mala fide gestor* in German law: see the text to note 285 above) and he could also have certain rights arising from an owner-possessor relationship. The practical example mentioned in the discussion of *Geschäftsmaßung* at p 106 could not arise in South African law: a person cannot acquire ownership of property from someone who has borrowed it (*nemo plus iuris transferre potest quam ipse habet*) so the owner may recover his property by means of the *rei vindicatio* and does not have to rely upon an enrichment remedy as in German law.

³⁷² For the historical background, see, for example, Van Zyl *Negotiorum Gestio* 105 ff; De Vos *Verrykingsaanspreeklikheid* 40, 84, 214-5; *Odendaal v Van Oudishoorn supra* at 437 ff.

³⁷³ Whitty and Van Zyl (n 4) 391-2. Also see Van Zyl *Negotiorum Gestio* at 105; *Odendaal v Van Oudishoorn supra* at 437G; D 17.1.40; C 2.19.24; De Vos *Verrykingsaanspreeklikheid* 27; Rubin (n 82) 29-30.

³⁷⁴ See, e.g., De Vos *Verrykingsaanspreeklikheid* 59, Huber *Heedendaegse Rechtsgeleertheit* 3.28.8; Van der Keessel *Theses Selectae* 505; Van der Keessel *Praelectiones ad Gr* 3.3.30.

³⁷⁵ De Vos *Verrykingsaanspreeklikheid* 59; Voet 3.5.11.

³⁷⁶ *Union Bank v Beyers*, *Union Bank v Du Toit supra*; *Ryneveld v The Wine Depot* (1833) 2

acting against the protest of the *dominus* in *Colonial Government v Smith and Company*.³⁷⁷

Smith and Company was a firm that imported and traded in explosives.³⁷⁸ With the informal consent of the Port Elizabeth Town Council, it stored its explosives in magazines situated on the outskirts of the town. Later, with the expansion of the town and the advent of the Boer War, the council regarded the magazines as a source of danger to the public. It accordingly requested Smith and Company to remove the magazines to a different site. In spite of repeated requests and ultimata from the council and the government, the company did nothing to comply with this request. Eventually, despite the formal protest of Smith and Company, the government had the explosives placed on a ship for safe storage. The government sued for the cost of removing and storing the explosives.

Regarding the removal of the explosives to the ship, Smith and Company argued, *inter alia*, that the explosives had been moved without its consent and despite its protest.³⁷⁹ The government, on the other hand, argued that it had acted like a *negotiorum gestor* and that it should accordingly be reimbursed for its expenses. The court stated that

the usual conception of a *negotiorum gestor* is one who, without express mandate, carries on the business, or who protects the property of another who is absent or who is incapable of acting for himself. As a rule, if the owner is present, or is unwilling or forbids the business being done, the unauthorised agent cannot force his services upon such owner.³⁸⁰

It went on to hold,³⁸¹ however, that a *mala fide* possessor could claim compensation for useful expenses, that the government in this case (though not a *mala fide*

Menz 185 (where the Court allowed one Brand to appear on behalf of the Wine Depot Company as *negotiorum gestor* but only because the opposing party consented, and not because it in any way 'admitted that he had any right to appear in that capacity if any objection had been made to his so doing': see 185. This case is cryptically short, and it appears that the institution of *negotiorum gestio* was used in circumstances analogous to the Roman law i.e. Brand acted as the *dominus*'s representative in the legal proceedings. Such circumstances would not arise today because nobody is 'permitted to raise or defend an action on another's behalf and in his name, or to represent another in legal proceedings' without a mandate: see Whitty and Van Zyl (n 4) 383).

³⁷⁷ *Supra* at 392.

³⁷⁸ See the judgment at 388 ff for the facts.

³⁷⁹ See 390.

³⁸⁰ At 392.

³⁸¹ Citing Voet 3.5.11.

possessor) should not be in a worse position than a *mala fide* possessor, and therefore that the government's claim for the cost of removal should succeed.³⁸² (The government's claim for the costs of storage was also granted, but on a different basis. The court allowed the claim because the goods were stored with the implied consent of Smith and Company, as they were free to move the explosives to another location at any time but chose not to do so.)³⁸³

This case is usually cited as authority for the proposition that a *gestor* who acted *domino prohibente* is allowed to sue the *dominus* with an extended *actio negotiorum gestorum* i.e. an enrichment action.³⁸⁴ It should be noted, however, that, although the court mentioned that Smith and Company were 'the richer for the expenditure, in that they [had] ... been saved incurring the expenses themselves, and their property [had] ... been preserved to them thereby',³⁸⁵ it held that the government should be reimbursed for all the expenses it incurred in removing the explosives. It could thus be argued that the action in question was the normal action for expenses and not an enrichment action;³⁸⁶ that it was thus an *actio negotiorum gestorum contraria* proper, and not an extended action. The case therefore does not constitute clear authority for the granting of an enrichment claim to a *gestor* acting against the express wishes of the *dominus*.³⁸⁷ Even if the claim had merely been for Smith and Company's enrichment, it could be argued that the government was a *mala fide gestor* in that it acted in its own interests (as the representative of the public) in removing the explosives.

Nearly eighty years later, the question again raised its head in the case of *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd*.³⁸⁸ Rejecting an *obiter dictum* to the contrary in *Odendaal v Van Oudtshoorn*,³⁸⁹ the Cape Provincial

³⁸² At 393.

³⁸³ At 394. There was also a claim for the cost of storing other explosives which had been placed on the ship by Smith and Company themselves. The court also dealt with this as a contractual question i.e. the goods had been stored with the company's consent. See the judgment at 394.

³⁸⁴ See Van Zyl *Negotiorum Gestio* 108-9; Whitty and Van Zyl (n 4) 392-3.

³⁸⁵ At 393.

³⁸⁶ Although, admittedly, it could be said that the measure of the expenses and the amount of the enrichment coincided.

³⁸⁷ It is also questionable whether it should fall within the scope of *negotiorum gestio* proper, but this question will be considered below.

³⁸⁸ *Supra*.

³⁸⁹ *Supra*, at 438A, where he refers to *Pretorius v Van Zyl* 1927 OPD 226 at 230. Also see Joubert (n 23) at 276: 'According to authority the third party will, however, have no claim

Division allowed an extended *negotiorum gestio* action.³⁹⁰

In this case,³⁹¹ Murray and Stewart agreed to build a shopping centre in Wynberg for Taylam. Taylam authorised Standard Bank to pay the builders most of the contract price upon presentation of the architects' certificates. When the builders presented a certificate to the bank, however, Taylam advised the bank not to pay the relevant amount, as Taylam believed the certificate not to be binding. Taylam further warned the bank that if it paid Murray and Stewart, it would be doing so 'at its own peril'.³⁹² The bank, believing that it was bound to pay, did so, notwithstanding Taylam's warning.

It then claimed the amount of the payment from Taylam, on the basis of unjustified enrichment. Taylam argued, in defence, that the payment had been made in contravention of its express instructions, that it was not in Taylam's interests but rather purely in the bank's interests, that it was unreasonable and that any enrichment was not unjustified.³⁹³ The bank thereupon raised an exception to this defence, arguing, *inter alia*, that Taylam's defence was based on its belief that it (Taylam) was not indebted to the builders and that, as Taylam presumably³⁹⁴ did owe the amount to the builders, it had been enriched at the expense of the bank which had settled its (Taylam's) debt.³⁹⁵

Although the first question for decision therefore appears to have been whether or not Taylam was indebted to the builders,³⁹⁶ the judge identified the main issue as being 'whether the payment of another's debt made in own interest and in contravention of the debtor's prohibition of such payment can give rise to a claim

[under *negotiorum gestio*] if he has performed contrary to an express prohibition of the debtor'. As authority for this statement he cites Vinnius 1.3.29 (30) pr n 9, Huber *Heedendaegse Rechtsgeleertheit* 3.38.20, Van Leeuwen *Censura Forensis* 1.4.32.4, *Shaw v Kirby supra*, *Van Staden v Pretorius supra*, *Odendaal v Van Oudishoorn supra* but does not mention *Taylam's* case.

³⁹⁰ Also see Whitty and Van Zyl (n 4) 392.

³⁹¹ For the facts, see pp 384-387 of the judgment.

³⁹² At 386A and 386G of the judgment.

³⁹³ At 386C-D.

³⁹⁴ See paragraph 4 of the plaintiff's grounds for the exception at 387C ('On the premise that the defendant was in fact indebted to M & S ...'), which suggests the plaintiff's uncertainty in this regard.

³⁹⁵ At 386H - 387C.

³⁹⁶ See 384F: 'It is this exception that is now being tried.'

based on unjustified enrichment.³⁹⁷ After discussing the Roman and Roman-Dutch authorities in this regard, and what he characterised as the ‘only ... decision of any real importance’,³⁹⁸ *Colonial Government v Smith & Co*,³⁹⁹ the judge held that the performing party would be entitled to an action even if he acted against the express wishes of the debtor, provided that the performing party proved ‘circumstances that would make it just for it to have acted in contravention of ... [the debtor’s] expressed wishes.’⁴⁰⁰

Most commentators approve of the court’s granting the *actio negotiorum gestorum utilis* in such circumstances, but they differ in regard to the qualifications attached to the remedy by the court.⁴⁰¹

The first point to make here is that *Taylam*’s case does not properly belong in the category of cases being discussed in this chapter, because there *was* a legal relationship between A and B. They were linked by a banker-client contract, and against that background, B gave A an instruction to pay C. B later revoked this instruction but A nevertheless paid. In other words, there was initially an instruction or authorisation, but it was later withdrawn. This is a case concerning what the Germans would call an *Anweisung* (a special kind of instruction or authorisation), and it will be discussed in more detail in the next chapter. Secondly, it appears that the intention of the bank was not to assist B, but to fulfil its own contractual obligations. In other words, this was really a case of a *mala fide gestor*,⁴⁰² and imposing enrichment liability could have arguably been justified on that ground alone. It was accordingly unnecessary for the court to hold that a *gestor* who acted *domino prohibente* was entitled to an extended enrichment action.

At this stage, however, it might be useful to ask whether, as a general rule, our law *should* grant relief to a *gestor* who has acted against the express wishes of the *dominus*. The institution of *negotiorum gestio* (properly so-called) is arguably

³⁹⁷ At 387H.

³⁹⁸ At 393E.

³⁹⁹ *Supra* and 11 CTR 521.

⁴⁰⁰ At 395C.

⁴⁰¹ De Vos *Verrykingsaanspreeklikheid* 215 and Rubin (n 82) 33 approve, whereas Van Zyl *Negotiorum Gestio* 110 and Eiselen and Pienaar *Unjustified Enrichment* 228 disapprove of the qualification.

⁴⁰² The necessary *animus negotia aliena gerendi* being absent: the bank intended to pay the amount in question, not for Taylam, but for its own purposes.

aimed at compensating the *gestor* for acts of altruism – in the limited sense explained above – but it should not go so far as to condone all instances of interference in the affairs of another. To allow the *gestor* a claim for all of his expenses (an *actio negotiorum gestorum contraria*) where he acted against the express wishes of the *dominus* would clearly be going too far. It would tilt the scales too much in favour of the *gestor* by permitting him to ignore the explicit wishes of the *dominus* and to ‘encumber him with help’⁴⁰³ which he clearly does not want.⁴⁰⁴ It would also inadequately protect the *dominus*’s interest in ‘the autonomous and independent management of his own patrimony and affairs.’⁴⁰⁵ What more could the *dominus* do to prevent interference in his affairs than to forbid it? It seems inequitable to expose him to an action in such circumstances. The original idea behind recognising *negotiorum gestio* as a legal institution was to accommodate the interests of a party who has helped another without his consent, in circumstances where that person was either not present or incapable of giving his consent. A situation of *negotiorum gestio* could thus only arise where the will of the *dominus* could not be established.⁴⁰⁶ Where the *dominus* has forbidden the administration of his affairs, his will is clear. Moreover, if the *dominus* could forbid the act in question, he was surely also capable of permitting it. Someone who administers the affairs of another against the express will of the latter should therefore not be considered under the head of *negotiorum gestio*.

Attempts to justify allowing the *gestor* an enrichment claim on the basis of the policies underlying *negotiorum gestio* similarly founder. To say that someone who interferes in the affairs of another against his wishes should be granted any compensation for doing so (even if it is only the amount by which the *dominus* has been enriched) offends one’s sense of justice. In general,⁴⁰⁷ the only justification for allowing an action in such circumstances would be the prevention of unjustified enrichment. It could thus be argued that, as such cases have nothing to do with the

⁴⁰³ Samuel Johnson, quoted in James Boswell *Life of Johnson* 3 ed (1987, OUP World Classics) 185.

⁴⁰⁴ The *gestor* might be motivated to act for paternalistic reasons, or to promote his own interests (in which case the situation overlaps with that of the *mala fide gestor*, as does *Taylam*’s case *supra*).

⁴⁰⁵ Whitty and Van Zyl (n 4) 392.

⁴⁰⁶ Cf the requirement in German law that the *gestor* is obliged to inform the *dominus* of the *gestio* and, if possible, to wait for his decision: § 681 sent. 1 BGB; *Medicus Schuldrecht II* marg note 627.

⁴⁰⁷ There might be situations where other countervailing policies carry more weight than individual autonomy e.g public safety, or the protection of children.

reward or condonation of the *gestor*'s administration of the affairs of another, they should accordingly be treated as ordinary situations of enrichment, and not (unhappily) forced into the mould of *negotiorum gestio*, whether in its true or its extended form.

Even if one accepts that a *gestor* who acts *domino prohibente* should be allowed to sue for enrichment, it could be argued that, at the very least, the enrichment action of such a *gestor* should be confined to narrow limits. Whitty and Van Zyl thus argue that the action should only be available in certain 'narrow categories of cases'.⁴⁰⁸ They cite the following categories as examples: 'where the *gestio* promotes an overriding public interest outweighing the prohibition,'⁴⁰⁹ and the payment of debts.⁴¹⁰ Regarding the payment of the debts of another, the authors go on to say that

[c]ases involving discharge of liabilities over the debtor's protests do not normally involve a serious infringement of the debtor's independence and autonomy because their net effect is nothing worse than a compulsory change of creditor. There must however be safeguards to protect a debtor-*dominus* who has a right of retention or lien, or of compensation (set-off).⁴¹¹

The statement of the court in *Taylam*'s case that a plaintiff would have to prove 'circumstances that would make it just for it to have acted in contravention of ... [the debtor's] expressed wishes' is an attempt to safeguard the interests of the protesting *dominus*, formulated in general terms.⁴¹² The problem is that the criterion of justice

⁴⁰⁸ Whitty and Van Zyl (n 4) 392.

⁴⁰⁹ Whitty and Van Zyl (n 4) 392-3: 'such as the need to remove a store of explosives away from the dangerous neighbourhood of a town to a place of safety, or the provision of necessary aliment to a child despite the protests of the alimentary debtor.' It could be argued that in the first category of cases the *gestor* is not administering the affairs of the *dominus*, but is fulfilling its own public-law obligations, just as the bank in *Taylam*'s case was carrying out what it perceived to be its own contractual obligations. Regarding the second category, see note 451 below.

⁴¹⁰ See the discussion of payment in accordance with countermanded instructions in the next chapter.

⁴¹¹ Whitty and Van Zyl (n 4) 392-3. Also cf the views expressed by the AD in *B & H Engineering v First National Bank of South Africa Ltd supra* at 295B cited in note 364 above. There might be negative consequences for a debtor, however, e.g. the new creditor might be harsher than the old, the debt might be about to prescribe etc. That there is also a need to protect the debtor who has a change of creditors imposed upon him against his will is illustrated by the law of cession, which provides certain protection to a debtor whose creditor cedes the claim to another. On the protection of debtors in cases of cession, see, e.g. Van der Merwe *et al Contract* 452 ff. Also see the text at p 131 ff below.

⁴¹² See Van Zyl *Negotiorum Gestio* 110 and Eiselen and Pienaar *Unjustified Enrichment* 228, who are critical of this qualification, whereas De Vos *Verrykingsaanspreeklikheid* 215 and Rubin (n 82) 33 support it. In this regard, also see Silke (n 90) 274: 'Where there is meddling in the affairs of another in own interest against the express wishes of the other, it is

is rather vague, and therefore unhelpful.⁴¹³

A comparison with German law might shed some light on the questions whether an enrichment claim should be granted to a *gestor* who acts against the express wishes of the *dominus*, and what safeguards might serve to protect the interests of the *dominus* in such circumstances.

As mentioned above, it should be borne in mind that a case such as *Taylam's* would not be dealt with under the heading of 'performance of the obligation of another' in German law because the bank's administration was originally authorised by Taylam (even though that authorisation was later withdrawn). In Germany, cases of authorisation or instruction (*Anweisungen*) are dealt with in a category of their own, with their own rules, because there are different policies at play, and different interests to be balanced.⁴¹⁴ In terms of German law, Taylam's original authorisation of payment would also exclude the case from the ambit of *Geschäftsführung ohne Auftrag* in any of its forms. The essence of *Geschäftsführung ohne Auftrag* is, after all, the absence of a mandate or any other legal relationship authorising performance to another. Where a 'dominus' specifically instructs a 'gestor' to perform the administration in question, the case is immediately excluded from the ambit of *Geschäftsführung ohne Auftrag*, even if that instruction is later withdrawn or the performance subsequently prohibited.

That said, how would German law treat a situation where if A performed in terms of B's obligation to C against B's express will in the absence of any actual or purported instruction or authorisation? It will be remembered that if a third party purports to make a performance owed by another, and the debtor objects, the creditor is entitled, but not compelled, to refuse to accept the performance. If he accepts the

even more important that the meddling should not be gratuitous, but that both parties should have a real interest in the matter that is meddled with. It is not only the meddling that must not be gratuitous, but there must not be gratuitous disregard of the wishes of the *dominus*. In fact, there must be some just cause for disregarding his wishes. The public spiritedness and the good neighbourliness that occasions the concern for the affairs of another must be present to bring the matter within the ambit of the *actio negotiorum gestorum contraria*, which action covers a claim based upon unjust enrichment as well as a claim based upon a quasi-contract.'⁴¹³ As an *ex post facto* enquiry, it is particularly unhelpful to a *gestor* who, when deciding whether to ignore the prohibition of the *dominus*, might want to know whether he would be entitled to some relief should he intervene in spite of such prohibition.

⁴¹⁴ Analytically, the *Anweisung*-situation is not seen as an instance of performance of another's obligation, because the performing party (A) is regarded as having performed to the instructing party (B), and not to B's creditor (C).

performance notwithstanding the debtor's objection, the debt would be extinguished (although there is some authority to suggest that the debt would not be extinguished by the performance of a third party in such circumstances).⁴¹⁵ Assuming, however, that the creditor does not refuse to accept the third party's performance, and that such performance indeed extinguishes the obligation in question, what would the legal position be? A and B would not be linked by a relationship of *berechtigte Geschäftsführung ohne Auftrag* (justified *negotiorum gestio*) because the administration took place against B's will.⁴¹⁶ Provided that the other requirements of *Geschäftsführung ohne Auftrag* are met, however, the case would constitute one of *unberechtigte* (unjustified) *Geschäftsführung ohne Auftrag*.⁴¹⁷ A would thus be able to claim B's enrichment by means of a *Rückgriffskondition*, as explained above.⁴¹⁸ It will also be recalled that the Germans justify granting a claim to A merely on the basis of the prevention of unjustified enrichment.⁴¹⁹ Special safeguards have been developed, however, to protect the position of the original debtor. Thus he will not be liable if he receives something that is of no use or benefit to him and that is of such a nature that it cannot be returned.⁴²⁰ Secondly, he will probably not be liable if he loses the enrichment.⁴²¹ Thirdly, when sued by A, he may raise any defences that he would have had against his original creditor, C, and can set off against B's claim any claim which he may have against C.⁴²²

This raises several points of interest. First of all, it is interesting to note that anyone who administers the affairs of another against his wishes will be entitled to an enrichment action, and German law regards the prevention of unjustified enrichment as sufficient reason for granting a remedy to such a person. It thus seems that, as far as the policies underlying the law are concerned, the prevention of unjustified enrichment overrides the prevention of interference in the affairs of another in these circumstances. It is perhaps also significant that although German law has a general basis for enrichment liability, the remedy afforded to the *gestor* (the *Rückgriffskondition*) constitutes one of the special subdivisions in the typology

⁴¹⁵ See p 72 above.
⁴¹⁶ See p 85 above.
⁴¹⁷ See pp 86 and 97 ff above.
⁴¹⁸ See p 99 above.
⁴¹⁹ See p 99 above.
⁴²⁰ See p 99 above.
⁴²¹ See p 99 above.
⁴²² See p 101 above.

of enrichment law developed by von Caemmerer.⁴²³ As was said above, this is also true of the enrichment action of the German equivalent of our *mala fide gestor*,⁴²⁴ and the same point may be made here: this suggests that there is some justification for treating this as a special case even after our courts recognise a general enrichment action.⁴²⁵

Next, it should be pointed out that German law requires that, apart from the will of the *dominus*, all the other requirements for *Geschäftsführung ohne Auftrag* must be satisfied for the case to qualify as *unberechtigte Geschäftsführung ohne Auftrag*. In other words, the *gestor* must have administered the affair of another without his authorisation but with the intention – whether actual or presumed – of doing so for his benefit.⁴²⁶ In addition, the requirements posed by the law of unjustified enrichment must be met in order for the *Rückgriffskondition* to be available. Amongst these requirements, attention should be drawn to the one which demands that the defendant must have received something ‘at the expense of’ the plaintiff. As was explained in Chapter One,⁴²⁷ this requirement applies to all of the *Nichtleistungskonditionen*, the species of enrichment remedy of which the *Rückgriffskondition* is a member.

It is not only certain requirements of *Geschäftsführung ohne Auftrag* that apply in cases where someone administers the affairs of another against his wishes, but also certain of its consequences.⁴²⁸ Thus the *gestor* must compensate the *dominus* for any loss his actions have caused.⁴²⁹ The liability thus imposed on the *gestor* provides a counterweight to his enrichment claim against the *dominus* that is absent in South African law. Perhaps we should follow Germany’s lead in spelling out the ways in which the *gestor* might incur liability that would balance his interests against those of the *dominus*.

The German rules which seek to protect the interests of the *dominus* can also

⁴²³ See Chapter One at p 24.

⁴²⁴ At p 42.

⁴²⁵ Also cf Reinhard Zimmermann ‘Unjustified enrichment: the modern civilian approach’ (1995) 15 *Oxford Journal of Legal Studies* 403 at 417 ff.

⁴²⁶ The *Fremdgeschäftsführungswille*.

⁴²⁷ At p 42.

⁴²⁸ See, for example, Medicus *Schuldrecht II* marg note 629.

⁴²⁹ § 678 BGB and see Medicus *Schuldrecht II* marg note 629 for further details in this regard.

guide us in developing our law by more precisely defining the 'circumstances that would make it just for [a *gestor*] ... to have acted in contravention of ... [the debtor's] expressed wishes'.⁴³⁰ We, too, can find safeguards in our law of cession (which is analogous to this situation because it also entails a substitution of creditors⁴³¹ against the will of the debtor). Our law of cession provides certain protection to a debtor whose creditor cedes the claim to another, provided that the debtor acts *bona fide*.⁴³² Thus a debtor who concludes a compromise with his original creditor (i.e. the cedent) will be treated as if he concluded the compromise with the cessionary. Similarly, if the original creditor releases the debtor, or extends the time within which the debtor had to perform, the debtor may raise these as defences against the cessionary; he will be regarded as having been released from liability, or granted an extension by the cessionary. Finally, if the debtor purports to set off a claim against that of his original creditor, this will be treated as a set-off against the ceded claim now held by the cessionary, even if the debtor's claim was not yet liquidated when the cession took place.⁴³³ There is no reason why the protection afforded the debtor in these circumstances should not be extended, by way of analogy, to the *dominus* who has suffered a change of creditors against his will. Thus a protesting *dominus* (B) who is sued for enrichment should be able to raise against the *gestor* any defences (such as compromise, release, or extension of time for performance) that he would have had against his original creditor. Similarly, he should be able to set off against the *gestor*'s extended *actio negotiorum gestorum* any claim which he could have set off against his original creditor's claim.

The other methods which German law uses to protect a *dominus* in a case of *unberechtigte Geschäftsführung ohne Auftrag* are perhaps not as pertinent to cases of performance of another's obligation as the cession-analogy.⁴³⁴ A possible exception is the rule that the *dominus* will not have to restore to the *gestor* anything that he has received which is of no use or benefit to him⁴³⁵ and which cannot itself be returned.

⁴³⁰ As required by *Taylam's* case *supra*. See p 125 above.

⁴³¹ B's contractual creditor (C), for example, would be substituted by an enrichment creditor (A).

⁴³² On the protection of debtors in cases of cession, see, e.g., Van der Merwe *et al Contract* 453 ff. (Obviously, notice to the debtor – as discussed by those authors at 452 – would not be apposite in the circumstances presently being considered.)

⁴³³ For all of these examples, see Van der Merwe *et al Contract* 453–4, and the sources cited there.

⁴³⁴ Thus it is difficult to understand how one can 'lose' the extinction of a liability by a third party.

⁴³⁵ See Medicus *Schuldrecht II* marg note 628; where the *dominus* derives 'keinen Nutzen'.

Performance in terms of an obligation that was about to prescribe could fall into this category: in such circumstances the enrichment of the *dominus* is merely technical as he would have imminently lost the liability even if it had not been discharged by the *gestor*. Equity demands that the *gestor* be denied a claim to this 'enrichment', which is as unsubstantial as something 'writ in water'. That this is so is illustrated by the fact that judges who grant the extended *actio negotiorum gestorum* on the basis of *Taylam's* case cite the payment of a debt that was about to prescribe as an example of circumstances where it would not be just for the *gestor* to have acted against the debtor's expressed wishes.⁴³⁶

Another interesting insight emerges from this comparison of the South African law and German law regarding the action against a protesting *dominus*. In view of the various qualms expressed about this action, it is striking to note that a wider range of *gestores* will be granted recourse in terms of German law than in South Africa. Thus German law allows a *Rückgriffskondition* not only to a *gestor* who acts against the express wishes of the *dominus* but also to one who acts against his actual (unexpressed) wishes, or his presumed will, or against his interests.⁴³⁷ In the light of this, it seems almost bizarre that South African law grants an enrichment action only to a *gestor* who acts against the express wishes of the *dominus*, the situation which is the most extreme form of unjustified administration of the affairs of another (i.e. the one in which the *gestor's* actions seem most objectionable). In the circumstances, and bearing in mind that the rationale for granting the *gestor* an enrichment claim is the prevention of unjustified enrichment, I cannot see why a similar claim should not be granted to the *gestor* who administers the affairs of another against his actual or presumed will or against his interests. If the *gestor* who acts against the protests of the *dominus* (and is thus clearly aware of his wishes) is entitled to relief, why should such recourse⁴³⁸ be denied a *gestor* who, without

⁴³⁶ *Standard Bank Financial Services v Taylam (Pty) Ltd supra* at 395C. See, for example, *B & H Engineering v First National Bank of SA Ltd supra* at 295E.

⁴³⁷ I.e. the other situations of *unberechtigte Geschäftsführung ohne Auftrag*. Note that these echo some of the arguments raised in *Taylam's* case *supra*. It will also be recalled that ratification by the *dominus* can convert a situation from one of unjustified (*unberechtigte*) *Geschäftsführung ohne Auftrag* to one of justified (*berechtigte*) *Geschäftsführung ohne Auftrag*. As Medicus says, however, after the event, the *dominus* will usually not want an administration that he did not originally want and he will therefore not ratify it: see *Schuldrecht II* marg note 628.

⁴³⁸ Bearing in mind that this is the only recourse that would be available, as the action arising from *negotiorum gestio* proper would also be unavailable because the administration was arguably *inutiliter*.

having received an express prohibition, administers the affairs of another against his will or against his interests? If the enrichment of a *dominus* who has protested against the interference in his affairs is regarded as unjustified, why should the enrichment of a *dominus* against whose will or interests the administration has taken place be regarded as justified?

The comparison also highlights an anomaly in South African law. In general, the law of unjustified enrichment mirrors its legal neighbours. Thus the borders of enrichment liability are often determined by the limits of contractual liability⁴³⁹ and by certain rules of property law.⁴⁴⁰ To a certain extent, the extended *actio negotiorum gestorum* similarly mirrors the law of *negotiorum gestio* proper. The three main requirements of *negotiorum gestio* are that there must be an act of administration of the affairs of another, with the *animus negotia aliena gerendi*, and such administration must be *utiliter*. Each of these has a counterpart in the law of enrichment. For example, someone will arguably be entitled to an enrichment action if his act is 'defective' because he purports to administer the affairs of another without the capacity to act.⁴⁴¹ If someone administers the affairs of another without the *animus negotia aliena gerendi*, he also will be entitled to an enrichment action: if the requisite intention is lacking because he thinks he is administering his own affairs, he will be a *bona fide gestor*; if the requisite intention is lacking because he intends to benefit himself, he will be a *mala fide gestor*. Against this background, it seems anomalous that the only circumstances in which an enrichment action will be granted to a *gestor* who acts *inutiliter* are arguably those where he has acted against the express prohibition of the *dominus*.⁴⁴² A piece of the picture thus seems to be missing. It is as startling as looking at one's reflection in a mirror and seeing a blank space where there should be an eye. In my opinion, anyone who administers the affairs of another against his will (whether actual or presumed, express or implied) or against his interests, should be granted an enrichment action. There are precedents

⁴³⁹ Thus, for example, where there is a shift of assets from one person to another in terms of a valid contract, there can be no question of unjustified enrichment; the enrichment will have taken place *cum causa*. See Zimmermann (1995) 15 *Oxford Journal of Legal Studies* 403 regarding the relationship between the law of unjustified enrichment and the other two branches of the law of obligations.

⁴⁴⁰ Here we can think of the impact of the abstract principle of transfer of ownership: see Chapter One at p 17 ff above.

⁴⁴¹ See p 139 below.

⁴⁴² Administration in the face of an express prohibition by the *dominus* must surely be regarded as having been *utiliter coeptum*.

for this kind of extension, or argument by analogy. Thus, in *Colonial Government v Smith*,⁴⁴³ the court argued that the government should be allowed an action because it should not be in a worse position than a *mala fide* possessor.⁴⁴⁴

(c) **Where the *dominus* or *gestor* is a minor**

If a minor administers the affairs of a major, in circumstances where all the requirements for *negotiorum gestio* are fulfilled, there is no reason why the minor should not be able to claim all the expenses he has incurred in doing so.⁴⁴⁵ Similarly, the law confers upon a minor *dominus* the same rights as those enjoyed by a major *dominus*.⁴⁴⁶ While a minor's rights are thus identical to those held by any other *gestor* or *dominus*, a minor's liability under the law of *negotiorum gestio* is somewhat different. The leading author on *quasi negotiorum gestio* in South Africa states that, just as a contractual action against a minor with limited capacity⁴⁴⁷ is limited to the extent to which the minor remains enriched,⁴⁴⁸ so too are the actions based on *negotiorum gestio*.⁴⁴⁹ In other words, whether the minor is sued as *dominus* or *gestor*, the other party's action will be an enrichment action.^{450 451}

⁴⁴³ *Supra*.

⁴⁴⁴ See the text to note 382 above. The same sort of argumentation has been used to justify the claim of the *bona fide gestor* – see Van Zyl *Negotiorum Gestio* 105: 'In any event, in view of the recognition of the *mala fide gestor*'s action, there can be little doubt that the *gestor* who administers the affairs of another in the *bona fide* belief that they are his own, will be accorded an action for the recovery of his necessary and useful expenses....'

⁴⁴⁵ See, e.g., D.3.5.3.4 and Rubin (n 82) 61. This is also the position in German law: see p 107 above.

⁴⁴⁶ Note that, as said above at p 84, the *dominus* need not have contractual capacity for a relationship of *negotiorum gestio* to arise between himself and the *gestor*: also see Van Zyl *Negotiorum Gestio* 26; Wessels *Contract* para 3583. This is the same as German law, which disregards any incapacity of the *dominus*: see p 107 above.

⁴⁴⁷ Who concluded the contract without the assistance of his parent or guardian.

⁴⁴⁸ Regarding the limitation of the contractual liability of minors see, e.g., *Edelstein v Edelstein NO and Others supra*, which did away with the 'benefit theory' introduced in *Nel v Divine Hall & Co* (1890) 8 SC 16. See Belinda van Heerden, Alfred Cockrell and Raylene Keightley (general eds) *Boberg's Law of Persons and the Family* 2 ed (1999) at 772 ff for a discussion of the benefit theory, 'born in bastardy, reared in confusion and dispatched with decision' (at 777). Also cf Wessels *Contract* para 3580 ff. It should be borne in mind that the two forms of liability should be clearly distinguished: De Vos *Verrykingsaanspreeklikheid* 214.

⁴⁴⁹ Van Zyl *Negotiorum Gestio* 87 ff. He thus regards this as an instance of the *actio negotiorum gestorum utilis* (the action based on *quasi negotiorum gestio*). Cf Whitty and Van Zyl (n 4) 393 (limitation apparently only where the *dominus* is a minor – minor *gestor* not discussed) and De Vos *Verrykingsaanspreeklikheid* 214 (where he only discusses the limitation of the *gestor*'s action in circumstances involving a minor).

⁴⁵⁰ Van Zyl *Negotiorum Gestio* 87. Cf Whitty and Van Zyl (n 4), who refer only to the situation where the *dominus* is a minor: 393. Also cf Wessels *Contract* para 3580 ff, where he leaves open the question of the liability of a minor *gestor*. For criticism of the limitation of the claim of a minor *gestor*, see Rubin (n 82) at 49. Also see *idem* 60-1 (for discussion of the

(i) **Liability of a minor *dominus***

Most modern commentators agree that, as in Roman⁴⁵² and Roman-Dutch law,⁴⁵³ anyone who has managed the affairs of a minor may only sue the minor for his enrichment, notwithstanding compliance with the requirements of *negotiorum gestio*.⁴⁵⁴

situation where the *dominus* is a minor).

⁴⁵¹ Situations where the minor is a *dominus* or *gestor* should also be distinguished from those where the true *dominus* is the minor's guardian: see, e.g., De Vos *Verrykingsaanspreeklikheid* 214. In this regard, also see De Vos *op cit* 47 and 95.) The duty to provide children with what is necessary, taking into account the family's standard of living, falls within the parameters of the parental duty of support. If a third party (A) performs what is owed by C's parent or guardian (B), then he can sue the parent or guardian on the basis of *negotiorum gestio* or unjustified enrichment. (Van Heerden *et al* (n 449) at 813, 814; *Pretorius v Van Zyl supra*; De Vos *op cit* 214) Thus an aunt who pays her (unemancipated) 17 year old nephew's school fees, or provides him with food and shelter, in the absence of his parents should be able to sue his parents for reimbursement. Whether she may claim all her expenses or whether her action is limited to the extent by which the parents have been enriched (by the saving of expenses) would depend on whether the case satisfies the requirements of *negotiorum gestio* proper or falls into one of the categories of *quasi negotiorum gestio*, and the normal rules would apply. It has been suggested that provision of necessities to a minor is one of the situations where it is unobjectionable for a *gestor* to act *domino prohibente*. (See Whitty and Van Zyl (n 4) 393.) If one considers the situation from the perspective of the values and policies underlying the law, this appears to be correct; the minor's interest in being maintained and the public interest in the care of minors outweigh the parent's interest in private autonomy. It appears that if the minor has no guardian, or is self-supporting, a party who has supported the minor may sue the minor himself for the amount by which he has been enriched by the saving of expenses. (See, e.g., Van Heerden *op cit* at 813.) Thus, in *Pretorius v Van Zyl supra*, Pretorius maintained an orphaned minor, Gertruida, in terms of a contract concluded with Lamprecht, who had been elected her guardian but who had never been formally appointed by the Master. Later, Van Zyl was appointed guardian and took over the maintenance of the minor. Pretorius then sued Van Zyl 'for compensation in the amount of his costs and expenses in maintaining Gertruida during the period' in question. (See judgment at 228.) The court granted Pretorius's claim on the basis of enrichment, not *negotiorum gestio* and the case has been interpreted as an instance of the extended *actio negotiorum gestorum*. (See, e.g., Eiselen and Pienaar *Unjustified Enrichment* 219, 222.) The judge regarded the enriched party as being Gertruida herself (see the judgment at 229 ff) in that she did not have to support herself with funds from her inheritance, and said (at 227) that in suing Van Zyl, he was 'virtually' suing the minor. In effect, the case concerned the claim of a major *gestor* against a minor *dominus* and the comments made in the text below would apply.

⁴⁵² In which all obligations binding *pupilli* were limited to the extent of their enrichment: see D. 3.5.(36) 37 pr; Van Zyl *Negotiorum Gestio* 87. For the common-law position also see De Vos *Verrykingsaanspreeklikheid* 46 ff, 95 ff, 214 and Rubin (n 82) 60.

⁴⁵³ Voet 3.5.8 and the authors cited in the previous footnote.

⁴⁵⁴ Van Zyl *Negotiorum Gestio* 87 ff; Whitty and Van Zyl (n 4) 393; Eiselen and Pienaar *Unjustified Enrichment* 219 ff; Wessels *Contract* paras 3583 and 3621 (but cf his criticism in para 3622: '... there does not seem to be any reason why there should be an exception made in the case of minors to the general rule that the *gestor* is entitled to be indemnified for all useful expenses ...'); De Vos *Verrykingsaanspreeklikheid* 214 (where subscribes to the view of Wessels); Rubin (n 82) 60. Also note the point made by Eiselen and Pienaar *Unjustified Enrichment* at 222 that '[t]he *gestor* will in any case be entitled to claim all his losses and expenses from the guardian if the conditions for the *actio negotiorum gestorum contraria* against the guardian have been complied with in the event of the guardian having a duty to maintain the minor.'

The South African judgment generally cited in support of this proposition was delivered in the old case of *Prince qq Dieleman v Berrange, alias Anderson*.⁴⁵⁵ Mr and Mrs Dieleman executed a mutual will in terms of which the survivor would have a usufruct over the children's share (half of their joint estate, which amounted to R41 640) until the children reached majority, in order to enable the surviving parent better to educate the minor children. Mr Dieleman died and Mrs Dieleman executed a *kinderbewys* in her children's favour, in respect of their half of the joint estate. She then remarried and became Mrs Anderson. The children (represented by their attorney, Prince) later sued their mother for their inheritance.

She claimed various deductions, two of which are interesting for our purposes.⁴⁵⁶ First, she claimed that the children's inheritance should be reduced by the R33 230 that she had spent on their education in England.⁴⁵⁷ The court held that she was bound to educate the children in a 'suitable manner' and if, in doing so, she spent more than the income of the children's inheritance, the excess could not be claimed from her children.⁴⁵⁸ Her argument seems to have been based on the idea that, in paying for their schooling, she had settled a debt on their behalf, or on behalf of her husband's deceased estate (i.e. that she was fulfilling the obligation of another, and that she should be reimbursed for her outlay in doing so). The fallacy is obviously that neither the children nor the deceased estate had an obligation to pay for their education, and that in making the payments, she was performing in terms of her own duty of support.

She also claimed a deduction for half of the legal expenses she incurred in pursuing a case concerning the value of the joint estate⁴⁵⁹ all the way up to the Privy Council.⁴⁶⁰ At the time of those legal proceedings Mrs Anderson was not her children's guardian, and neither her children nor their guardians had been parties to

⁴⁵⁵ *Supra*. Cf Eiselen and Pienaar *Unjustified Enrichment* 219 ff, who cite *Pretorius v Van Zyl supra* as their main authority for the *actio negotiorum gestorum utilis* 'where the *gestor* administered the affairs of a minor'.

⁴⁵⁶ The court allowed the third deduction, which related to an error in the valuation of the joint estate.⁴⁵⁶ This amount concerned the value of one Steyntje and her children who were, at the time of valuation, supposed to be slaves owned by the joint estate, but who were held by the Privy Council to have been free at that time and hence not part of the joint estate.

⁴⁵⁷ For the facts, see the summary of the judgment at 435.

⁴⁵⁸ See the summary of the judgment at 435-7.

⁴⁵⁹ The matter of Steyntje and her children.

⁴⁶⁰ At 436-7.

the proceedings.⁴⁶¹ In other words, they had not consented to the litigation. The court held that

as the defendant had instituted that action *causa sui proprii commodi*, and, as owing to its unsuccessful termination, the minors, the plaintiffs, have derived no benefit whatever from it, those costs have not been *in rem versum* of the plaintiffs, nor have they been *locupletiores facti* thereby, the defendant cannot, as a *negotiorum gestor*, claim any part of those expenses, *actione contraria negotiorum gestorum* (*vide Voet 3: 5, 8 and 9*), and the plaintiffs are under no equitable obligation, to repay any part of those costs.⁴⁶²

The court added that guardians who institute legal proceedings with regard to their minor wards' property cannot claim the costs of those proceedings from the children if the litigation is unsuccessful.⁴⁶³ Mrs Anderson's argument is clearly based on *negotiorum gestio*: she had, as *gestor*, administered the affairs of her children (without their consent) by instituting legal proceedings to determine the value of their inheritance, and she should be entitled to deduct the expenses she incurred in doing so. The case is used as authority for the proposition that an action brought by a *gestor* against a *dominus* who is a minor is limited to the extent to which the minor remains enriched by the *gestio*. While it is correct that Mrs Anderson's action was limited to her children's enrichment, it appears that the reason why the court held that her action was merely an enrichment action was not that the *domini* were minors, but that she was acting in her own interests (i.e. she was a *mala fide gestor*)⁴⁶⁴ or that she thought she was administering her own affairs (i.e. she was a *bona fide gestor*). The children had not been enriched, as the proceedings had been unsuccessful, and therefore Mrs Anderson's argument was rejected.⁴⁶⁵ In my opinion, the case therefore does not constitute good authority for the proposition that a *gestor*'s claim against a minor *dominus* is limited to the measure of the minor's enrichment.

Limiting claims against minor *domini* to the extent by which they remain

⁴⁶¹ 436-7.

⁴⁶² See the summary of the judgment at 437.

⁴⁶³ At 437.

⁴⁶⁴ See p 111 ff above.

⁴⁶⁵ The court thus seems not to consider the saving of legal expenses as a form of enrichment. Had it decided otherwise, it would have opened the door to interfering lawyers taking up cases 'on behalf of' potential plaintiffs without their consent (but cf *Ryneveld v The Wine Depot supra*), and then suing them for enrichment if the proceedings were unsuccessful. From a public policy perspective, this decision thus also appears to be correct.

enriched is also questionable from the perspectives of legal doctrine and public policy. A contract concluded by an unassisted minor cannot give rise to legal obligations that are binding on the minor, because he has, at most, limited capacity to act⁴⁶⁶ and because he needs to be protected from his 'own immaturity of judgment'.⁴⁶⁷ Lack of capacity does not, however, preclude the imposition of duties that arise *ex lege*, such as those flowing from *negotiorum gestio* or unjustified enrichment.⁴⁶⁸ If a *gestor*, who is a major, sues a minor *dominus*, it is not clear why the claim should be limited to the minor's enrichment. Surely the law should encourage people to help minors, and there seems to be no reason why someone who has assisted a minor by means of a *gestio* should not be able to recover his full expenses. This is one of the areas in which interference in the affairs of another would generally be socially acceptable, and it seems strange to say that this is not a case of *negotiorum gestio* but only *quasi negotiorum gestio*. If a *gestor* who helps a minor is only allowed to claim the amount by which the minor is enriched, parties might be discouraged from giving assistance to minors. To say that the minor *dominus* only has to disgorge his enrichment is to give him an advantage due to his immaturity, where that immaturity is irrelevant except in that it might be the very reason why the *gestor* has intervened. It also seems illogical to allow a claim for expenses against a *dominus* who was, for example, temporarily insane or unconscious (and therefore unable to give his consent to the *gestor*) and not to allow such a claim against a minor. The normal rules of *negotiorum gestio* strike a balance between encouraging good neighbourliness and discouraging meddling, and there is no need to upset this balance just because one of the parties is a minor.⁴⁶⁹

⁴⁶⁶ Cf *infantes*, who have no capacity to act at all, and emancipated minors, who have full capacity.

⁴⁶⁷ *Edelstein v Edelstein NO and Others supra* at 15C-D.

⁴⁶⁸ See Van Heerden *et al* (n 449) at 748, and the authorities cited there. See also *Edelstein v Edelstein NO and Others supra* at 12D and 13E-F. Such duties are imposed regardless of the will of the party in question, so the immaturity of the minor is arguably irrelevant. See the argument of Pothier cited by Rubin (n 82) at 60-61: (regarding *negotiorum gestio*) the *dominus* 'incurs the obligation without his consent, because he incurs it even before he is aware of the administration from which it arises. It is immaterial, therefore, in order that his obligation should be valid, whether or not he is capable of validly consenting, because it is not as a result of any consent on his part that he incurs the obligation. It follows, therefore, that it should be immaterial, in order to enable him to incur a valid obligation, whether he is a *puber* or *impuer*, minor or major.' Also see Van Zyl *Negotiorum Gestio* 88-9 in this regard.

⁴⁶⁹ Also see De Vos *Verrykingsaanspreeklikheid* 214 and Eiselen and Pienaar *Unjustified Enrichment* 222. The latter authors also point out that '[t]he *gestor* will in any case be entitled to claim all his losses and expenses from the guardian if the conditions for the *actio negotiorum gestorum contraria* against the guardian have been complied with in the event of the guardian having a duty to maintain the minor.'

If any additional support is needed for the point of view expressed here, it may be found in German law. As said above,⁴⁷⁰ German law disregards any lack of capacity on the part of the *dominus*. A minor *dominus* will therefore incur the same liability in terms of the law of *Geschäftsführung ohne Auftrag* that a major would. A *gestor* can thus sue the minor⁴⁷¹ *dominus* according to the normal rules.⁴⁷²

In conclusion, it seems unnecessary and even inadvisable for modern South African law to retain a common-law rule that limits a *gestor*'s claim against a minor, where that rule seems to be out of step with the position in a comparable modern legal system, especially where that rule serves to undermine rather than protect the position of a minor.

(ii) Liability of a minor *gestor*

Turning to the position of the minor *gestor* in German law, we find that a *dominus* may only sue him in terms of the law of enrichment and the law of delict.⁴⁷³ Thus, if a minor receives proceeds as a result of the *gestio*, he will not be required to give them all to the *dominus*;⁴⁷⁴ he will only be liable to the extent of his enrichment. If, on the other hand, a minor negligently causes loss to the *dominus* in the course of the *gestio*, he will be required to compensate him for that loss according to the normal rules.⁴⁷⁵

According to our common law, a claim against a minor *gestor* was apparently also limited to his enrichment, if any.⁴⁷⁶ While some authors ignore the rule altogether,⁴⁷⁷ others have levelled various criticisms at it. These range from textual arguments to arguments based on policy considerations. Thus it has been suggested that the Roman text upon which the rule is based is corrupt.⁴⁷⁸ On the other hand,

⁴⁷⁰ At p 107.

⁴⁷¹ Or a person who is insane, or otherwise incapacitated.

⁴⁷² German law thus appears to have followed the views of writers such as Thomasius, Pothier and Kohler: for a summary of their views, see Van Zyl *Negotiorum Gestio* at 88-9.

⁴⁷³ § 682 BGB. Also see p 108 above.

⁴⁷⁴ As required by the normal rules: see BGB § 681 sent 2 read with § 667; Medicus *Schuldrecht II* marg note 627.

⁴⁷⁵ See, e.g., Medicus *Schuldrecht II* marg note 627.

⁴⁷⁶ See Ulpian D.3.5.3.4; Groenewegen *Tractatus de Legibus abrogatis et Inusitatis ad D 3.5*, Voet *Commentarius ad Pandectas* 3.5.3; Rubin (n 82) at 49; Wessels *Contract* para 3582.

⁴⁷⁷ Whitty and Van Zyl (n 4) 393.

⁴⁷⁸ I.e. it was interpolated and therefore does not reflect the classical law, in terms of which the minor *gestor*'s liability was the same as that of any other *gestor*: in this regard, see Rubin (n 82) 49.

Rubin argues that minor *gestores* do not need the same sort of protection against the pitfalls of youth as that afforded to (unassisted) minor contractants.⁴⁷⁹ This is because, he says, in contrast to contractual liability, the *gestor*'s liability derives, 'not from consent, but simply from his act of interference in the affairs of the *dominus*.'⁴⁸⁰ This argument implies that the immaturity and inexperience of a minor might cause an error of judgement in entering into a contract, but that such considerations are not relevant where he makes a *gestio*, on the other hand. This argument is, with respect, unconvincing. Both undertaking a *gestio* and concluding a contract arguably require an exercise of will. It seems to me that it is just as possible for a minor *gestor* to make an error of judgement in deciding to pay someone's debts or carrying out some other *gestio* as to make a foolish decision to enter into an unfavourable contract.⁴⁸¹

It is helpful, however, to compare the position of a minor *gestor* with that of a minor contractant.⁴⁸² The law protects a minor contractant from any detrimental consequences of his having entered into a contract without the assistance of his guardian. It does not, however, deny him any advantages that might flow from the same legal act.⁴⁸³ Thus he cannot be sued for performance in terms of such a contract, but this will not prevent him from acquiring rights against the other party.⁴⁸⁴

What are the legal consequences of *negotiorum gestio*, as far as the *gestor* is concerned? The positive consequences for the *gestor* include a claim to compensation for his expenses, a lien on the property of the *dominus*, and release from any obligations incurred in the course of the *gestio*. There is no compelling

⁴⁷⁹ (n 82) 49.

⁴⁸⁰ (n 82) 49.

⁴⁸¹ Rubin's argument seems to echo Pothier's thoughts quoted in note 468 above, but it should be noted that Pothier was referring to the liability of a minor *dominus*, and not a minor *gestor*. By definition, the *dominus* is not required to consent or otherwise authorise the *gestio*, or even to be aware of it, so no exercise of his judgement is required – this means that it is irrelevant whether he has full capacity, limited capacity or none at all (see note 446 above). The same argument cannot be applied to a minor *gestor*, as Rubin attempts to do, because the *gestor* has to form the requisite intention, etc.

⁴⁸² Bearing in mind that the two legal situations must not be confused. Regarding the importance of clearly distinguishing between the liability of those minors who have entered into contracts and those involved in *negotiorum gestio*, see De Vos *Verrykingsaanspreeklikheid* 214. Although he is referring to liability of a minor *dominus*, the same caution should apply where the minor is a *gestor*. Also see Elselen and Pienaar *Unjustified Enrichment* 222.

⁴⁸³ But this, the policy underlying the rules of law protecting minors, should not be confused with the 'benefit theory', which was a general rule in its own right.

⁴⁸⁴ Although he may only be able to exercise certain of these rights (e.g. the right to claim performance by the other party) once he himself has performed (otherwise his claim would be defeated by the *exceptio non adimpleti contractus*).

reason why a minor who successfully (and justifiably) administers the affairs of another should not at least be entitled to recover his expenses.⁴⁸⁵ Similarly, looking at the situation from the perspective of the *dominus*, there is no reason why he should incur a lesser liability just because the *gestor* who has justifiably intervened in his affairs happened to be a minor. These positive results of *negotiorum gestio* should thus accrue to a minor *gestor*.

The 'negative' consequences of *negotiorum gestio*, on the other hand, include the imposition of liability on the *gestor* for any loss he has caused to the *dominus* through his negligence, and for any proceeds acquired through the *gestio*. In addition, he is obliged to complete the *gestio* properly and to account to the *dominus*.⁴⁸⁶ Let us assume that a minor *gestor* managed the affairs of another, satisfying all the requirements of *negotiorum gestio*, in circumstances where an adult would not have intervened. If the law absolved a minor of all of these consequences, he would not have to complete the *gestio*, he would not have to account to the *dominus*, he would not be liable for losses, and he would be able to keep any proceeds of the *gestio*. This would mean that a minor *gestor* could profit from what seemed like a foolhardy decision to interfere in another's affairs. Our law states, however, that he should incur liability, but only to the extent that he remains enriched by the *gestio*. This seems to me to be an equitable way of dealing with a minor *gestor*; he will not suffer as a result of the *gestio*,⁴⁸⁷ but he will not profit from it either. It also accounts for the real possibility that the minor's immaturity may have led to his loss or disposal of some of the proceeds of the *gestio*: he may, for example, have spent the money on taking all his friends to the cinema, or on buying presents for his girlfriend. This adjustment in the rule that the *gestor* must disgorge any proceeds thus achieves a fine balance between the encouragement of altruistic behaviour, the protection of private autonomy, and protection of minors against the dangers of youth. I therefore would be in favour of retaining this common-law rule, following the German example.

(d) Where a *gestor* acts *bona fide* thinking that he is administering his own affairs

⁴⁸⁵ Release from contractual obligations would not generally be relevant here, as the minor cannot incur obligations without his guardian's assistance.

⁴⁸⁶ See pp 92-3 above.

⁴⁸⁷ E.g. by having to pay the *dominus* for proceeds of the *gestio* that he no longer has.

The fourth category of cases generally regarded as falling under *quasi negotiorum gestio* is that of the *bona fide gestor*.⁴⁸⁸ Such cases correspond to the first situation of non-genuine *Geschäftsführung ohne Auftrag* in German law i.e. the case of so-called *Eigenleistung* ('own performance').⁴⁸⁹ In other words, someone administers the affairs of another in the *bona fide* belief that they are his own. For example, A thinks that he has inherited a small business which he has been running for his now-deceased father. He therefore pays the business's debts to C out of his own pocket. In fact, the business has been left to B in terms of a later will. It is important to remember that, as mentioned above,⁴⁹⁰ this manifestation of *quasi negotiorum gestio* would only be relevant here⁴⁹¹ if – as seems unlikely – an obligation is extinguished by the performance of a third party who does not intend to perform for that other person.⁴⁹² I have decided to deal with it along with the other instances of *quasi negotiorum gestio* in South African law for convenience.

The case usually cited⁴⁹³ as the main authority in South African law for the proposition that a *bona fide gestor* is entitled to bring an enrichment claim against the 'dominus' is *Klug & Klug v Penkin*.⁴⁹⁴ In this case, the City Health Department asked Daisy and Maria Klug, who have been recorded for posterity as 'spinsters and property owners', to make some repairs to their buildings.⁴⁹⁵ The owners were absent so their agents effected the necessary repairs. But the agents also had an adjacent building, owned by Penkin, repaired at a cost of £14. They did so acting in the *bona fide* belief that this building, which had been mentioned in the list furnished by the Health Department, was also owned by the Klugs. The Klugs (A) paid for the repairs, including the £14, and later claimed it (the £14) from Penkin (B), alleging that the defendant was liable to pay this amount 'by reason of the necessary nature of

⁴⁸⁸ Hutchison (ed) *Wille's Principles* at 642-3; Eiselen and Pienaar *Unjustified Enrichment* 232 ff; De Vos *Verrykingsaanspreklikeid* 215; Whitty and Van Zyl (n 4) 388, 390-1. On the common law, see De Vos *op cit* 43, 85; Eiselen and Pienaar *Unjustified Enrichment* 234; Rubin (n 82) 36 ff.

⁴⁸⁹ See p 101 ff above.

⁴⁹⁰ At p 110.

⁴⁹¹ That is, in section 3 of this chapter: where A performs (and extinguishes) B's obligation to C.

⁴⁹² See the discussion of the relationship between B and C in the first part of this chapter at p 65 ff, especially the text to note 63. Also see note 214 above.

⁴⁹³ See, e.g., Hutchison (ed) *Wille's Principles* at 642-3; Eiselen and Pienaar *Unjustified Enrichment* 232 ff; Whitty and Van Zyl (n 4) 391.

⁴⁹⁴ *Supra*.

⁴⁹⁵ See the judgment at 403-404 for the facts.

the work, whereby the property of the defendant has been enhanced in value and he himself thus enriched.⁴⁹⁶ The Magistrate upheld the defendant's exception that there was no cause of action.

On appeal, Watermeyer J stated the general rule that a *negotiorum gestor* may claim for necessary and useful expenses.⁴⁹⁷ He assumed that the repairs were necessary and useful to Penkin. He then said that the problem was that the agents thought that the building belonged to the Klugs (A). 'It seems clear from the *Digest* and [from] ... *Voet* that [the agents'] ... mistaken belief at the time they made the repairs does not effect [sic] their right.'⁴⁹⁸ He cited the following passage from *Voet*, stating that it was apposite:

Moreover, to found this action, it is not necessary that the gestor should precisely have the intention of binding him whose affairs were in truth conducted, but it suffices that he thought he was conducting, and wished to conduct, the affairs of another. For what if he thought that he was conducting the affairs of Titius, when they were really not the affairs of Titius but of Maeivius? It is answered that he can with effect proceed in such a case against Maeivius.⁴⁹⁹

The judge therefore concluded that the agents would have a right to claim the expenses as *gestor*. He went on to ask whether this claim could be brought by the Misses Klug in the absence of a cession to them.⁵⁰⁰ He said that *Voet* continued:

and even against Titius himself if he has ratified what has been carried on: for his ratihabitation makes that to be his business, where from the beginning it was not in reality, but had by an error been undertaken supposing it to be his because Titius himself, after ratification, was in turn bound by this action to him whose business it really was, just as if he had himself carried it on.⁵⁰¹

The judge held that, although the agents exceeded their authority, they purported to act as agents and their action was impliedly ratified by the plaintiffs who were accordingly entitled to bring the claim for the expenses.⁵⁰²

Two points need to be made about this case. First of all, the first passage

⁴⁹⁶ See the judgment at 404.

⁴⁹⁷ At 404.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Commentarius ad pandectas* 3.5.12, Buchanan's translation, cited at 404.

⁵⁰⁰ At 404.

⁵⁰¹ 3.5.12, Buchanan's translation, cited at 405.

⁵⁰² At 405.

cited from Voet, which the judge said was ‘directly in point’⁵⁰³ relates to the situation where one does not know the identity of the *dominus* – the rule is that the true *dominus* will be liable for expenses in such a case. It therefore does not deal with a case of the *bona fide gestor*, i.e. one who administers the affairs of another, thinking that he is administering his own affairs. To clarify the difference between the two situations: in the situation of the *bona fide gestor*, A administers B’s affairs, thinking that they are his own (A’s); in Voet’s first example, on the other hand, A administers B’s affairs, thinking that they are C’s.

Which situation was applicable in the Klugs’ case? The first question should be whether the agents’ acts were authorised. If there were no relationship of agency between the owners and the ‘agents’, then Voet’s first example would be apposite. It seems, however, that the agents’ acts that fell outside the scope of their authority were at least ratified by the owners. Therefore the agents’ acts can be imputed to the principals, and we can say that the owners (the principals), as *gestores*, administered the affairs of another in the *bona fide* belief that they were their own. In other words, Voet’s example was not in point.

It is submitted that a better approach would therefore have been first to consider whether the acts of the agent could be imputed to the principal, and then to ask whether the requirements of *negotiorum gestio* were satisfied. This is necessary because one has to consider the intention with which the acts are made, i.e. whether the *gestor* intends to manage his own affairs or not. In order to do so, one needs to know whether the *dominus*’s affairs are legally-speaking those of the agent, and therefore one cannot look at the agent’s intention in isolation, if he is acting as agent.

Secondly, the judge treats this as a normal *actio negotiorum gestorum contraria*.⁵⁰⁴ In other words, the claim was for the necessary and useful expenses incurred by the plaintiffs, and there was no mention that this claim was limited to the amount by which the *dominus* remains enriched.

Be that as it may, it is generally accepted that, as in German law, a *bona fide gestor* should be entitled to claim the amount by which the *dominus* remains enriched

⁵⁰³ At 404.

⁵⁰⁴ De Vos *Verrykingsaanspreeklikheid* 215.

by the administration.⁵⁰⁵ Bearing in mind the policy factors at play in cases of true *negotiorum gestio* and *quasi negotiorum gestio*, this is probably correct. Allowing a *gestor* to claim back his expenses is to 'reward' altruism, and any tendency towards meddling is kept in check by the requirement that it be *utiliter coeptum*. To administer the affairs of another in the mistaken belief that they are one's own is not an indication of good-neighbourliness; it rather suggests an irresponsible attitude to one's own affairs. On the other hand, a *bona fide gestor* has not deliberately ignored the will of the *dominus*⁵⁰⁶ and he has not administered the affairs of another for his own ends.⁵⁰⁷ If a *mala fide gestor* and a *gestor* who acts *domino prohibente* are given relief, why should such relief be withheld from a *bona fide gestor*? Looking at the situation from the point of view of the *dominus*, on the other hand, why he should have to cover all the costs incurred by someone who purely coincidentally administered his affairs, even in cases where he no longer has the benefits of that administration?⁵⁰⁸ There is, however, no compelling reason why the *dominus* should retain any benefits which he still has; he should therefore have to disgorge any enrichment that remains in his hands at the time when the *gestor* institutes his claim.

Allowing the *bona fide gestor* an enrichment claim thus seems to strike an equitable balance between the interests of the parties.⁵⁰⁹ As said above, however, this situation probably belongs in the next section of this thesis – it is only relevant here if A can discharge B's debt to C thinking that he is performing in terms of his own obligation.

German and South African law: comparison and synthesis

Regarding the relationship between A and B, the findings so far can be summarised as follows. Assuming that B owed a debt to C, and A performed in terms thereof in the absence of any contractual or other authorisation by B – and thereby extinguished

⁵⁰⁵ See, e.g., Van Zyl *Negotiorum Gestio* 104-5; Eiselen and Pienaar *Unjustified Enrichment* 232 ff; Whitty and Van Zyl (n 4) 391.

⁵⁰⁶ As in the case of a *gestor* who acts *domino prohibente*.

⁵⁰⁷ As in the case of a *mala fide gestor*.

⁵⁰⁸ As he would have to do if this were a case of *negotiorum gestio* proper.

⁵⁰⁹ Also see Whitty and Van Zyl (n 4) 391: 'It is difficult to refute the argument that if the law allows an enrichment action to a person intervening to promote his own interests, it ought equally or *a fortiori* to allow an action to the *bona fide gestor* who erroneously promotes the interests of the *dominus*.'

the debt – where was no contract between A and C:

In terms of both German and South African law, if the requirements of *negotiorum gestio*⁵¹⁰ are fulfilled, A will not sue B for enrichment; *negotiorum gestio* would constitute a legal ground, or justification, for the benefit to B.⁵¹¹ In other words, B's enrichment would not be unjustified.⁵¹² In such a case, however, A, as *gestor*, will be able to sue B for his expenses.⁵¹³

If the requirements of *negotiorum gestio* are *not* satisfied, on the other hand, there will be no *causa* for the benefit that A has rendered to B by settling the latter's debt to C. A may accordingly bring an enrichment action against B in certain circumstances.

In both German law and South African law, a minor who administers the affairs of another is not limited to suing for the other party's enrichment; he may accordingly claim all his expenses. In Germany, someone who manages the affairs of a minor may also recover all his expenses. In South Africa, on the other hand, a *gestor* who manages the affairs of a minor may only sue him for enrichment. Comparing our law with German law and assessing it from the point of view of the underlying policy considerations that are relevant in such cases has shown that our law is defective in this regard.

In terms of both German and South African law, A can sue B for unjustified enrichment if he (A) administered B's affairs, knowing that they were the affairs of another, for his own benefit i.e. *sui lucri causa*. In South African law, this would be considered a situation of *quasi negotiorum gestio*, where A is a *mala fide gestor*. German law would regard this as an instance of *angemaßte Geschäftsführung ohne Auftrag*, a type of non-genuine *negotiorum gestio*. In both cases, it must specifically be proven that A actually intended to administer the affairs for his own benefit. In German law, the availability of A's enrichment claim (an *Aufwendungskondition*) is conditional upon B's enforcement of his rights against A. If B does not sue A, A will

⁵¹⁰ Here I will use the South African terminology for convenience.

⁵¹¹ In any case, A would obviously not want to sue B for enrichment, as he would usually be able to claim more with an action for expenses against B.

⁵¹² Or, in German terms, B will not have received anything without legal ground.

⁵¹³ See above at p 92 ff.

be left without a remedy. In South African law, on the other hand, A can only sue B if, in the circumstances, B's enrichment was 'improper or unjustified' (an *ex post facto* enquiry, which also takes into account the reasonableness of the *gestor*'s behaviour). This requirement could be seen as a general norm, requiring the judge to consider various policy factors including the *boni mores* or it could be seen as a manifestation of the *utiliter*-requirement, which gives expression to the same policy considerations. Both systems thus pose an extra requirement that seeks to protect B's interests. The German requirement is certainly easier to apply, but cannot be followed in South Africa until there is clarification legal recourse, if any, available to B.

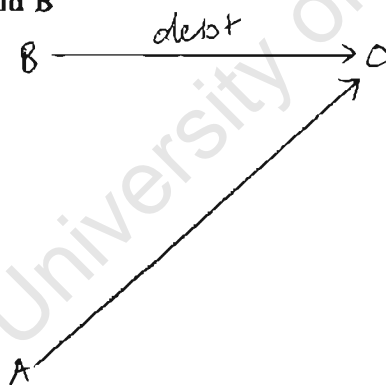
Both South African law and German law afford an enrichment remedy to someone who administers the affairs of another, thinking that he is administering his own affairs (i.e. a *bona fide gestor*): in Germany, this remedy would be the *Eingriffskondiktion*; in South Africa, it would be another instance where the extended *actio negotiorum gestio* would be available. In Germany, this action would not be available where the affair that was administered took the form of fulfilment of another's obligation, and this is probably also true of South African law.

South African law apparently also allows A an enrichment action against B where A has acted *domino prohibente*, but it has been suggested that the cases usually cited as authority for this proposition are questionable authority: the first was really a case of a *mala fide gestor* and the second was really a case of a revoked instruction (analogous to the countermanding of a cheque which will be considered in the next chapter, along with the corresponding German law). Whether such a claim should be allowed is doubtful when judged from the perspective of the policies underlying *negotiorum gestio*. Comparison with German law, however, suggests that the prevention of unjustified enrichment would, on its own, provide sufficient justification for the provision of such a remedy. German law thus grants a *Rückgriffskondiktion* to someone who administers the affairs of another where such administration is neither in accordance with the interests or will of the *dominus* (i.e. in a situation of unjustified *negotiorum gestio*, or *unberechtigte Geschäftsführung ohne Auftrag*). This would cover our situation of administration the affairs of a protesting *dominus* but also situations where the *dominus* did not expressly say that the

administration was against his will, and where it was not necessarily against his will but against his interests. German law specifically states that the other requirements of *negotiorum gestio* must be fulfilled in such circumstances, and allows the *dominus* to set off the cost of any damage caused by the *gestor* during the course of the *gestio*. It provides the *dominus* with additional protection by using protective devices derived from the law of cession. South African law again protects the *dominus* by referring to an open-ended norm: the *gestor* must prove 'circumstances that made it just' for him to intervene. It has been suggested that, following the German example, more concrete protection can be provided by borrowing protective rules from our own law of cession.

Now we have to turn our attention to what would happen if there were no legal relationship between A and B at all: no contract (whether actual or purported), no relationship of agency, no instruction, and, because there was no administration of the affairs of another, no *negotiorum gestio* and no *quasi negotiorum gestio*.

- 4 **Enrichment liability where A performs to C in terms of an obligation or supposed obligation B–C where there is no legal relationship between A and B⁵¹⁴**



- (a) **Enrichment liability where B owes a performance to C, A performs to C, but this performance does not discharge the debt owed by B to C**

Thus far, we have been discussing what would happen if A's performance to C discharged B's obligation to C. Now we have to consider the situation where A's performance to C fails to discharge a debt validly owed by B to C.

⁵¹⁴ In other words, they are neither linked by a contractual obligation, nor an obligation which arises *ex lege*, nor by a relationship of *negotiorum gestio* or *quasi negotiorum gestio*, and B has not instructed A to perform to C.

For example, a pop star (B) enters into a contract with an impresario C, in terms of which B agrees to sing at a concert in Cape Town. If B does not arrive, and a would-be singer in the audience (A) leaps on to the stage and sings all the songs B was supposed to perform, A's performance will not discharge B's obligation to C: it would be a situation of *delectus personae* (i.e. where the performance in question is so personal that nobody can make it on behalf of the debtor).⁵¹⁵ Another example of a situation where a debt B–C would not be discharged would be where A makes a performance to C but the performance does not correspond to the terms of the obligation B–C. In such a situation, A's performance will not usually extinguish B's obligation to C.⁵¹⁶ Or, in terms of German law, the creditor might have physically received but legally refused to accept a performance made by a third party because the debtor has voiced his objection thereto.⁵¹⁷ Or A might have performed to C in the mistaken belief that he (A) was obliged to do so, whereas the performance is in fact owed by B to C.⁵¹⁸

This last case is similar to the situation of the *bona fide gestor*. Whether it falls into this category or the last depends on whether a party can extinguish the debt of another, thinking that he is performing in terms of his own obligation. In German law, he clearly cannot discharge the debt of another in such circumstances;⁵¹⁹ he would therefore not have administered the affairs of another, and the case can therefore not be one of *irrtümliche Eigenleistung*. In other words, the *Nichtleistungskondiktion* available in cases of *irrtümliche Eigenleistung* would not be available against B. Whether or not a party can extinguish the debt of another thinking that he is performing in terms of his own obligation in South Africa is not clear. If he can do so,⁵²⁰ he would be treated as a *bona fide gestor*.⁵²¹ If not, his case would be covered here.

⁵¹⁵ See p 66 above.

⁵¹⁶ Unless, in German law, the performance is a *Leistung an Erfüllungs Statt*: see Chapter One at p 37 above.

⁵¹⁷ § 267 (2) BGB.

⁵¹⁸ See, e.g., Koppensteiner and Kramer *Bereicherung* 38 ff.

⁵¹⁹ See p 72 above.

⁵²⁰ For example by virtue of *commixtio*.

⁵²¹ See p 142 ff above.

In circumstances where A's performance fails to discharge B's debt to C,⁵²² C would be entitled to sue B for breach in both legal systems.⁵²³ There is no contract (real or supposed) between A and B. Neither is there a relationship of true *negotiorum gestio* nor one of *quasi negotiorum gestio* (or the corresponding German institutions) between A and B, as B's debt still stands (i.e. his affairs were not administered). As B is thus completely uninvolved, this is really a two-party situation,⁵²⁴ and should be solved according to the normal rules of enrichment liability. Therefore, if C had derived any financial benefit from A's performance,⁵²⁵ then A should sue C directly for this enrichment.⁵²⁶ In German law, the appropriate action would generally be a *Leistungskondiktion*.⁵²⁷ In South African law, there would arguably be general enrichment liability, or if the performance in question amounted to a *datio*, one of the *condictiones* would be available,⁵²⁸ depending on whether the other requirements of that specific *condictio* are satisfied.

(b) Enrichment liability where A performs to C, intending to discharge a debt owed by B to C, but B in fact owes nothing to C

Alternatively, A could have ostensibly performed in terms of B's 'obligation' to C where no such obligation existed. The obligation could be void, or it could have already been discharged, or the performing party could have performed more than was required. For example, an aunt pays her 22-year old nephew's university fees, unaware that he has already scraped together the money and settled his debt to the university, or that he has not registered this year, or that he had never registered at university at all.⁵²⁹

⁵²² See Koppensteiner and Kramer *Bereicherung* 39 regarding the last example viz where A performs to C, erroneously believing that he was himself obliged to make this performance to C, whereas B owed it to C: A's performance will not extinguish B's debt to C and B is thus not involved in any way. Also see Medicus *Schuldrecht I* marg note 140.

⁵²³ Assuming that the requirements for breach are satisfied in the particular case e.g. the debt must have been due.

⁵²⁴ Koppensteiner and Kramer *Bereicherung* 38: 'Hier ist aus keiner Perspektive ein Dreiecksverhältnis zu sehen, wenn man voraussetzt, daß sowohl D [A] als auch G [C] (fälschlicherweise) meinen, D [A] sei Schuldner des G [C].' ('Here, no triangular relationship can be seen from any perspective, if one requires that both A and C (erroneously) believe that A is the debtor of C.')

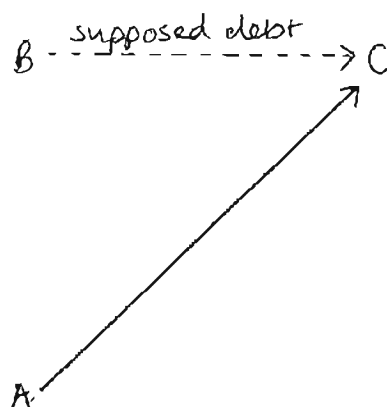
⁵²⁵ And had not given any counter-performance for it.

⁵²⁶ Assuming that the value of a *factum* were recoverable.

⁵²⁷ More specifically, at least in relation to the last example mentioned, it would be a *condictio indebiti*: Koppensteiner and Kramer *Bereicherung* 39.

⁵²⁸ See, e.g., Van der Merwe *et al Contract* 492n74.

⁵²⁹ See, e.g., Medicus *Bürgerliches Recht* marg note 684. Also see the examples (which I have slightly elaborated) given by Larenz and Canaris *Schuldrecht II*/2 243: A, the owner of a piece of land concludes a contract with a builder, B, who is to erect a building on A's land. B



The majority opinion in German law is that, if he acted of his own accord⁵³⁰ in making the 'performance' to C, A should be able to bring an enrichment action directly against C.⁵³¹ C has received something (*etwas erlangt*) in terms of § 812 BGB without legal ground.⁵³² This view has been explained in terms of the *Leistungsbegriff* as follows: when A makes the 'performance' to C, he makes this performance in his own right and not under the instruction of B. A is thus the appropriate person to form the intention that determines the path of the *Leistung*,⁵³³ and his intention is to increase the patrimony of C.⁵³⁴ The 'Leistungsbeziehung' ('performance-relationship') accordingly lies between A and C, and A should therefore be able to bring a *Leistungskondition* (in this case a *condictio indebiti*) directly against C.

subcontracts some of the work to an electrical firm, C. C, who is awaiting payment in terms of its contract with B, is paid by A, who wishes to speed up the progress on the building. Similarly, X sells something to Y but reserves the right of ownership until the purchase price is fully paid. Y then sells the same thing to Z. Z then pays X the rest of the purchase price to X in order that he receive ownership. In either case, it turns out that the contract between B and C is void.

⁵³⁰ Loewenheim *Bereicherungsrecht* 47; cf Larenz and Canaris *Schuldrecht II/2* who deal with cases where he is not acting on his own initiative under this heading, and distinguish them from *Anweisung*-cases. A is acting on his own initiative and not on the instruction of B. It is thus not an *Anweisung*-situation: Loewenheim *Bereicherungsrecht* 47; Medicus *Bürgerliches Recht* marg note 684: there is no *Anweisung*, whether real or supposed. The case must also be distinguished from those where A has a right to perform to C eg in terms of § 268 or § 1142 BGB which would take the case out of the category of three-cornered enrichment because in such cases there is a statutory transfer of the claim to A who thus takes C's place as B's creditor upon making the payment: Loewenheim *Bereicherungsrecht* 47.

⁵³¹ Koppensteiner and Kramer *Bereicherung* 49; *Münchener Kommentar/Lieb* § 812 marg note 108; Loewenheim *Bereicherungsrecht* 48 ff; Medicus *Bürgerliches Recht* marg note 685; Larenz and Canaris *Schuldrecht II/2* 243; Reuter and Martinek *Bereicherung* 467.

⁵³² See Chapter One at p 22 ff above.

⁵³³ I e a conscious and purpose-directed (*zweckgerichtet*) intention to increase the patrimony of another: see Loewenheim *Bereicherungsrecht* 48. Also see Chapter One at p 38 above.

⁵³⁴ In other words, this is not a case where B decides to perform to C, and instructs A to make the performance for him, so that when A hands something or does something for C, this really constitutes the performance (*Leistung*) of B to C.

On the other hand, certain writers⁵³⁵ consider that B should have an enrichment action against C, and that A's only recourse should be against B. The *Leistungsbegriff* is also used to justify this point of view: when A performs, he has B in mind; he thinks that he is performing in terms of B's obligation and he must thus have some sort of purpose, such as donation, which is directed towards B rather than C.⁵³⁶ In other words, A's intention or purpose, in delivering something to C⁵³⁷ and thus extinguishing B's (supposed) obligation to C, is either to make a gift to B or to impose some sort of obligation on B (e.g. obligations in terms of the law on *Geschäftsführung ohne Auftrag* (*negotiorum gestio*)).⁵³⁸ A's *Leistung* was accordingly made to B. Thus, for example, the aunt might intend the payment of university fees as a gift to her nephew, or she might intend to pay her nephew's fees in order to make him liable towards her as *gestor*. B, in turn, is regarded as having made a *Leistung* to C and, because § 267 BGB implies that a third party may form the intention to perform for the debtor, B's intention or purpose in 'performing' to C is inferred from A's purpose. In other words, there are two 'performance-relationships': B performs (*leistet*) to C, and A performs (*leistet*) to B. If it turns out that there was no obligation between B and C, B will accordingly be entitled to sue C, A must sue B, and B must cede his claim against C to A.

The fact that the same theory is used to justify two opposing viewpoints (and the convoluted reasoning employed in doing so) very nicely illustrates some of the shortcomings of the *Leistungsbegriff*. As explained in the previous chapter, the focus of this theory is the intention of the performing party. This is usually unproblematic where only two parties are concerned, or where the performing party clearly intends to perform only to one party. Where more than two parties are involved or where, as in this case, the performing party's intention is ambiguous, adherence to the *Leistungsbegriff* causes more confusion than clarity. Stated in simple terms, the theory sounds appealing: 'if you performed to X, and that performance was unjustified, you can claim it back'. To add that the performance is determined with reference to the performing party's intention also seems unproblematic; there are, after all, situations where someone physically hands something to one person while

⁵³⁵ Led by Esser (n 4) 346 ff.

⁵³⁶ Medicus *Bürgerliches Recht* marg note 684.

⁵³⁷ Or doing something for him.

⁵³⁸ See Loewenheim *Bereicherungsrecht* 48

intending it for another.⁵³⁹ But each further refinement of the theory seems to cause as many problems as it is intended to solve. Ultimately, to make the liability of the parties depend on something as spectral as whether A consciously directed his purpose towards increasing the patrimony of B or C, bearing in mind that this conscious purpose can be determined objectively from the perspective of someone in the shoes of C, seems to take us from the realm of common sense into the somewhat surreal world of *Begriffsjurisprudenz*. The focus of the enquiry is too narrow and too far removed from reality.

As said in the previous chapter, while the *Leistungsbegriff* still has its supporters, many German lawyers have heeded the criticisms of Canaris⁵⁴⁰ and others and now look at three-cornered situations from a broader perspective. Thus the situation where someone pays the non-existent debt of another has been analysed taking into account the interests of all of the parties, bearing in mind the ‘Canaris principles’ mentioned in the above chapter.⁵⁴¹

Thus it has been argued that B should not be involved in the ‘unravelling’ of a situation like this: he is not drawn into the picture by a relationship of justified or unjustified *Geschäftsführung ohne Auftrag*, or any other causal relationship, vis-à-vis A, and there are no other grounds for attributing A’s performance to B.⁵⁴² It is not a so-called ‘triangular situation’ and the normal enrichment rules would apply.

Who should bear the risk of the insolvency of B? If A had to sue B and B to sue C, (i.e. to proceed ‘via the triangle’), A would bear the risk of B’s insolvency. In other words, if B goes insolvent, A gets nothing. B’s creditors would be advantaged, on the other hand, in that they would have an enrichment claim against C. This would give an advantage to B’s creditors that they have done nothing to deserve.⁵⁴³ If A can sue C directly, A will not have to bear the risk that B goes insolvent, and B’s creditors would not receive the benefit of a claim against C. The ‘performance’

⁵³⁹ In other words, in certain situations the intention of the performing party carries more weight than the outward results of his performance.

⁵⁴⁰ Claus-Wilhelm Canaris ‘Der Bereicherungsausgleich im Dreipersonenverhältnis’ in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds) *Festschrift Karl Larenz zum 70 Geburtstag* (1973) 799.

⁵⁴¹ At p 45 ff.

⁵⁴² Canaris (n 540) at 848-9.

⁵⁴³ See Loewenheim *Bereicherungsrecht* 49.

received by C constitutes an unexpected windfall; to B's creditors, a claim against C would similarly be a stroke of luck; neither C's nor B's creditors' interests would accordingly be infringed if they were forced to give up what was to them a lucky windfall.⁵⁴⁴ In other words, allowing A to sue C directly merely means that C has to give up something that he was not entitled to, and that B's creditors will have to forego an advantage that they could not count on.⁵⁴⁵ It is also stated, in accordance with the second of Canaris's principles,⁵⁴⁶ that C cannot counter A's action with any defences arising from his (C's) relationship with B.⁵⁴⁷

Although there is some dispute whether A's action against C is a *Leistungskondiktion* or a *Nichtleistungskondiktion*,⁵⁴⁸ the majority view is that it is a *Leistungskondiktion*, more specifically, a *condictio indebiti*.⁵⁴⁹

The courts also allow A to sue C directly, with a *Leistungskondiktion*.⁵⁵⁰ The leading case is the notorious BGHZ 113, 62 (1990),⁵⁵¹ which concerned an entanglement of insolvent companies, mandates, alleged overpayments and disgruntled former employees. A company, W, mandated a firm of architects (X) to renovate a house. The architects in turn gave a mandate, in the name of W Company, to a firm of builders (L Company) to carry out certain work.⁵⁵² One of the employees of the firm of architects (E) was required to check the accounts. After he had cleared various accounts submitted by the builders, he was dismissed from the firm of architects.⁵⁵³ The job of checking the accounts was then taken over by one of the architects, K. K retrospectively reduced several of the builders' accounts previously cleared by E, on the grounds that the work had been completed for less

⁵⁴⁴ See Loewenheim *Bereicherungsrecht* 49.

⁵⁴⁵ Loewenheim *Bereicherungsrecht* 49. See Canaris (n 540) at 847 in this regard.

⁵⁴⁶ See Chapter One above at p 46

⁵⁴⁷ Medicus *Bürgerliches Recht* marg note 684; Loewenheim *Bereicherungsrecht* 49; Canaris (n 540) 847.

⁵⁴⁸ *Münchener Kommentar/Lieb* § 812 marg note 109.

⁵⁴⁹ See the text above at p 151.

⁵⁵⁰ *Münchener Kommentar/Lieb* § 812 marg note 108. See Lieb *loc cit* for further case references.

⁵⁵¹ This case is so complicated (involving a four-party-relationship), exceptional and improbable that it has been suggested that it should not be asked in examination questions: see Horst Heinrich Jakobs 'Die Rückkehr der Praxis zur Regelanwendung und der Beruf der Theorie im Recht der Leistungskondiktion' 1992 *NJW* 2524 and Medicus *Bürgerliches Recht* marg note 685.

⁵⁵² *Handwerkerarbeiten* i.e. work to be done by skilled craftsmen.

⁵⁵³ The circumstances of his dismissal are not mentioned in the report, so we can assume that they were not relevant to this case.

than the billed amounts. He alleged that W Company had therefore overpaid the builders in the amount of 45 258,71 DM. This amount was not repaid, and the builders' firm was sequestrated. Then W Company also went insolvent.

One of the members of W Company, C, subsequently wrote to B, who had previously been one of three architects who made up firm X but who had left due to some unspecified unpleasantness. In the letter, C (who wrote it as a 'personally liable shareholder/partner' of W Company),⁵⁵⁴ demanded settlement of the loss incurred viz 45 258,71 DM. B passed the claim on to his professional liability insurer, A, instructing him to investigate whether the claim was valid in law, and informing him that it appeared that it would be well-nigh impossible to controvert the claimant's evidence should the matter result in legal proceedings. The insurer requested proof from C that he was entitled to receive the amount that had been claimed. C answered that W had not been liquidated and that he was claiming the money in his personal capacity as he had advanced this sum to W Company. Apparently satisfied that C was entitled to receive the payment, the insurer (A) transferred 44 456, 26 DM to him (the original amount having been reduced by the excess due to the insurer).

K became aware of the payment⁵⁵⁵ and informed the insurer that there had in fact been no real overpayment to the builders; what had in fact happened was that the builders had threatened to stop working on the project as they had not been paid by W Company, and the firm of architects had alleged that there had been overpayments merely in order to induce the builders to continue the work.

The insurer A thereupon instituted legal proceedings against C and B, reclaiming payment of the relevant amount on the grounds that they had obtained it fraudulently. In addition, A claimed that C had to repay the money on the basis of unjustified enrichment, because W Company had not ceded the claim to him (C) and he had therefore not been authorised to receive the money.

To summarise the core facts: C (a former employee of W) asked B (a former partner in the firm of architects) to pay a debt and B submitted that claim to his

⁵⁵⁴ '[P]ersönlich haftender Gesellschafter': see the judgment at 63.

⁵⁵⁵ As the firm's 'no claims bonus' was reduced: see 64.

insurers A. The *Bundesgerichtshof* characterised the case as one where A made a payment to C with the intention of settling B's supposed (but non-existent) debt to C.⁵⁵⁶ The court held that the enrichment claim (which would be a *Leistungskondition*) against C was a valid one and that the insurer was the appropriate plaintiff in the circumstances. The *Leistung* in question, according to the court, was the transfer of the money from the insurer to C, and the insurer's intention in making this performance was to settle B's professional liability to W Company. The court said that A 'performed' to C because A had regarded C as the party who was entitled to claim damages.⁵⁵⁷ As there was no defect in the insurance contract between the insurer and X, which the court identified as the *Deckungsverhältnis*, insurer was under the impression that he was obliged to pay.⁵⁵⁸

The court also held that the defendant had received the *Leistung* without legal ground.⁵⁵⁹ In doing so, it dismissed as irrelevant the question whether W Co had a claim for damages against B. It also held that W Co had not ceded any claim to damages to C or authorised C to collect damages in his own name, and that C could not assume the right to represent the company in legal proceedings.⁵⁶⁰ In other words, C had no right to the payment. The court also rejected the argument that the payment to C had simultaneously extinguished B's professional liability to W Co.⁵⁶¹

The court accordingly rejected the argument that the enrichment claim should be directed against B.⁵⁶² The court distinguished this from a case of an instruction⁵⁶³ (with B as the instructing, and the insurer as the instructed party).⁵⁶⁴ The court said that B 'only informed the insurer that he was being sued for compensation by C, i.e. informed him of the insurance claim, and expressed the opinion that the demand was

⁵⁵⁶ Cf a simplified summary from Loewenheim *Bereicherungsrecht* 49-50: 'Architect B had third party insurance with insurance company A. A believed that they had to answer for damage caused by B to W, which B had reported to it. Because C was of the opinion that W had ceded his claim against B to him, A paid the sum to C. Later it turned out that there neither was a valid insurance claim nor had there been an effective cession of the alleged claim by W to C. A claimed back from C the sum which had been transferred to him.' (My translation, and I have changed the letters).

⁵⁵⁷ At 70.

⁵⁵⁸ See the judgment at 65.

⁵⁵⁹ At 66 and 68.

⁵⁶⁰ At 67.

⁵⁶¹ At 67.

⁵⁶² At 68.

⁵⁶³ A so-called *Anweisung*-case: see Chapter Three below for a detailed discussion of such cases.

⁵⁶⁴ At 68.

justified' and added that the insured was not entitled to instruct the insurer to pay,⁵⁶⁵ and the insurer had no obligation to obey.⁵⁶⁶ The court pointed out that, before paying a creditor, an insurer checks the validity of both the contract of insurance⁵⁶⁷ and the creditor's claim against the insured.⁵⁶⁸ In this case, when B informed the insurer of the claim against him, the insurer tested the validity of the claim. The insurer's initial doubts were dispelled by the further particulars received from C, and the insurer accordingly paid what it supposed to be B's debt to C.⁵⁶⁹ Here, the third party performs in his own right, whereas when someone is acting under instructions, he intends to perform as the debtor of the instructing party.⁵⁷⁰ In other words, where A settles B's debt to C of his own accord, he intends to 'perform' to C, whereas if he is carrying out B's instruction in making the payment, he himself intends to 'perform' to B, and to carry out B's 'performance' to C.⁵⁷¹

Finally, the court held that this case was not covered by § 814 BGB,⁵⁷² according to which anything that has been performed with the purpose of fulfilling an obligation cannot be reclaimed if the performing party knew that he was not obliged to perform. The court said that this provision only applies where the performing party knew that he was not legally obliged to perform, and this was not the case here.⁵⁷³

Significantly, the court confirmed that where a third party pays another's supposed debt, the paying party (A) can bring a *condictio* directly against the apparent creditor (C) if the debt did not exist, assuming that the supposed debtor (B) did not cause⁵⁷⁴ the performing party to perform. The court thus emphasised the fact that B had not instructed A to make the performance, and that there was therefore no reason to attribute the performance to B rather than to A.⁵⁷⁵ The court was therefore of the view that there was no reason to bring B into the picture at all, and A should

⁵⁶⁵

I e to make an *Anweisung*.

⁵⁶⁶

At 65. (My translation of the section enclosed by quotation marks).

⁵⁶⁷

The so-called *Deckungsverhältnis* ('cover relationship').

⁵⁶⁸

The *Valutaverhältnis* ('value relationship'). See the judgment at 66.

⁵⁶⁹

At 66.

⁵⁷⁰

See 68-9.

⁵⁷¹

See Chapter Three of this thesis.

⁵⁷²

See Appendix for text of this and the other enrichment provisions of the BGB.

⁵⁷³

I e not merely the facts which led to his not being obliged. See the judgment at 70.

⁵⁷⁴

Either actually, or by means of some act which could be attributed to him. See the judgment at 69.

⁵⁷⁵

At 69.

sue C directly.⁵⁷⁶

In terms of South African law, such cases would fortunately not present much difficulty. In general terms, we would say that C, and not B, has been enriched at A's expense. According to general principles, therefore, A should sue C directly. There would also be no difficulty in suing with one of the *condictiones* if the performance in question constituted a *datio*⁵⁷⁷ (in its most literal sense)⁵⁷⁸ from A to C, provided that the other requirements of the relevant *condictio* are satisfied in the circumstances. Thus, for example, for A to succeed with the *condictio indebiti*, he would have to prove that he made a *datio* to C in the absence of an underlying obligation due to an excusable error.⁵⁷⁹

It would not be possible according to the existing rules of South African law, however, for A to sue C for the value of a *factum*. (Thus, strangely, if A makes a *factum* to C, he can sue B for the value thereof if it constitutes a *gestio*, under the heading of *negotiorum gestio* or that of *quasi negotiorum gestio*, but he cannot sue C for the value thereof, if the case does not fall into either of those categories.) The restriction of the *condictiones* to *dationes* has often been criticised,⁵⁸⁰ and it is to be hoped that, should such a case arise, the court will use the opportunity at least to extend the *condictiones* to allow recovery of the value of a *factum*, or to recognise a general action.⁵⁸¹

There was nothing to suggest that the *datio* should be legally regarded as a *datio* to B,⁵⁸² as there was neither a contract nor an instruction between A and B, nor did A act as B's agent. There would also not be any relationship of *negotiorum gestio* or *quasi negotiorum gestio* between A and B because A would not have administered B's affairs (as B had no obligation to C). It is thus clear that A could not sue B in such circumstances.

⁵⁷⁶ At 70.

⁵⁷⁷ As opposed to a *factum*.

⁵⁷⁸ In other words, 'a giving': see D P Simpson *Cassell's Latin Dictionary* 5 ed (1968) q v.

⁵⁷⁹ See Chapter One at pp 7-8.

⁵⁸⁰ See, e g, Eiselen and Pienaar *Unjustified Enrichment* 108.

⁵⁸¹ See Chapter One in this regard.

⁵⁸² Cf *Phillips v Hughes; Hughes v Mophumulo* 1979 (1) SA 225 (C).

CONCLUSION

At the end of the previous chapter, the following question was posed: where A transfers something to (or does something for) C, who will have an enrichment claim against whom?

This chapter has shown that, provided that there is neither a contract nor any other valid *causa* in the relationship between A and B, and also no contract or other *causa* between B and C, A can bring an enrichment action directly against C in both systems. (In South African law, the traditional remedies do not allow recovery of a *factum* in such circumstances, but the general principles would.)

If A and B are not linked by any contract, and A purports to perform in terms of B's valid obligation to C but fails to discharge this obligation, A can also sue C for unjustified enrichment in both systems. (Again, the traditional remedies would not cover a *factum* in current South African law).

If, in the absence of any contract (between himself and A) obliging him to do so, A succeeds in discharging B's obligation to C, however, his case may fall within the boundaries of *negotiorum gestio* or its German equivalent. In such a case, A's recourse will be directed against B and not C. Should all the requirements of *negotiorum gestio* or *Geschäftsführung ohne Auftrag* be met, A may recover all his expenses from B. If, however, only some of the requirements are met, and the case therefore amounts to one of *quasi negotiorum gestio*, *unberechtigte* or *Geschäftsführung ohne Auftrag*, A may still sue B, but can only recover the amount by which B is enriched.

According to the general principles of South African law, we would say that B would only be drawn into the picture if he was enriched by A's performance in that his debt to C was extinguished. If A's performance failed to discharge a valid obligation between B and C, or if there was no such obligation between B and C, C (not B) would be the enriched party. It is therefore crucial to determine whether A's performance had the effect of discharging a valid obligation between B and C.

How would we determine whether the enrichment in question is *sine causa*? If C was the enriched party (i.e. where A's performance failed to discharge an obligation between B and C), our law would have no difficulty in saying that his enrichment would be *sine causa*: he had no claim to A's performance. If A's performance discharged a debt validly owed by B to C, however, A's performance would, in a sense be regarded as B's performance to C, and C would therefore have received it *cum causa*. If A's performance in such a case fell within the ambit of *negotiorum gestio* vis-à-vis B, B would also have received it *cum causa*. If the performance did not create a relationship of *negotiorum gestio* between A and B, however, B will have been enriched *sine causa* and A can sue him for unjustified enrichment.

The legal situation created by our traditional remedies, therefore, can also be explained using these two general requirements, on their own, without having to ask at whose expense the enrichment took place.⁵⁸³ They do not, however, explain the various protective requirements posed in the different situations of *quasi negotiorum gestio*. The fact that German law still has some of those categories, with requirements aimed at the protection of B, suggests that these categories should not be abandoned when we have a general enrichment action.

In German law, the best answer for the cases which do not fall into the categories identified by von Caemmerer is arrived at by using Canaris's principles. These indicate that in circumstances where A's performance to C does not extinguish an obligation B–C, A should be able to sue C directly. In other words, if C's receipt cannot be attributed to B, then A can recover any enrichment from C. If it can be attributed to B, then A should direct a possible enrichment action against B, unless A and B are linked by a relationship of justified *negotiorum gestio* (in which case A could recover all his expenses).

In the next chapter, we will consider what happens where A is prompted to perform to C rather than to B by B's instruction.

⁵⁸³ Cf, e.g., the approach of the SCA in *B & H Engineering v First National Bank of SA Ltd supra*.

CHAPTER THREE

UNJUSTIFIED ENRICHMENT IN THE CONTEXT OF PERFORMANCE IN TERMS OF AN ACTUAL OR PURPORTED INSTRUCTION

If B owes C something and is in turn owed something by A, B might instruct or authorise A to perform to C on his behalf.¹ Thus, for example, if A and B have concluded a contract of sale in terms of which A is to deliver a computer to B, and B and C conclude a contract for the sale of the same computer, B can instruct A to deliver the computer directly to C.² Or if B holds a bank account³ at bank A, he can order the bank to pay his creditor C either by writing a cheque, or by signing a credit card slip, or by authorising a standing order or bank transfer. Then again, B could owe damages to C in respect of a car accident. B could then instruct A, his insurer, to pay C in terms of the insurance contract between himself (B) and A.

Alternatively, B could instruct or authorise a third party (i.e. someone who is not his debtor) to perform to C on his behalf. For example, B leases premises from C and owes C R2 500 as rental. B can ask his mother (A) to pay the rent for him. Or B might ask A to lend him money by settling the debt owed by B to C. (For example, B could ask his bank to grant him an overdraft, and then instruct the bank to pay the rent to C.)

The question of enrichment might arise in any one of the above cases if the payment or transfer (A–C) takes place in terms of the instruction⁴ but one or more of the legal links between the parties is absent, invalid or otherwise ineffective. So, for

¹ See, for example, *Münchener Kommentar/Lieb* § 812 marg note 29.

² In other words, a case of so-called 'short-cut delivery'. See, for example, the hypothetical case discussed by Wieling *Bereicherungsrecht* at 87.

³ With a credit balance; but of the discussion (at p 165 below) of the abstraction principle in this regard.

⁴ Whether actual or supposed.

instance, if A delivers the computer to C in accordance with B's instruction, but it transpires that both of the contracts for the sale of the computers are invalid, will B or C be liable in terms of the law of enrichment? Alternatively, if B draws a cheque on his bank A for payment to his creditor C and then countermands the cheque, but the bank makes the payment regardless of the countermand, can either A or B sue C on the basis that he has been unjustifiably enriched? Or if insurer A pays C the damages as requested, but subsequently discovers that B's policy had lapsed before the car accident, will A have an enrichment claim, and, if so, against whom should it be directed? Or what would happen if B's mother paid his rent to C, but it turned out that the contract of lease was void and the money therefore unowed?

What the hypothetical situations in the first paragraph have in common is that a party instructs⁵ his debtor⁶ to perform to his creditor.⁷ In other words, in accordance with the instruction⁸ of B,⁹ A¹⁰ makes the performance owed by B to a third party C.^{11 12} In the situations in the second paragraph, on the other hand, a debtor instructs a third party to perform to his creditor.

Instructions and authorisations: the *Anweisung* in German law

In German law, these situations would all be seen as manifestations of the same legal concept, the *Anweisung*.¹³ This fertile notion has proved useful in several contexts: in

⁵ Or purports to instruct.

⁶ Whether actual or supposed.

⁷ Whether actual or supposed.

⁸ On such cases in general in German law, see Claus-Wilhelm Canaris 'Der Bereicherungsausgleich im Dreipersonenverhältnis' in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds) *Festschrift Karl Larenz zum 70. Geburtstag* (1973) 799 at 800 ff; Medicus *Bürgerliches Recht* marg notes 674 ff; Medicus *Schuldrecht II* marg notes 728-9; Koppensteiner and Kramer *Bereicherung* 24 ff; Loewenheim *Bereicherungsrecht* 35 ff; Jauernig/Schlechtriem § 812 marg notes 34 ff; S Meier 'Mistaken payments in three-party situations: a German view of English law' (1999) 58 *Cambridge Law Journal* 567; *Münchener Kommentar/Lieb* § 812 marg note 30 ff; B Markesinis, W Lorenz and G Dannemann *The German Law of Obligations Vol 1, The Law of Contracts and Restitution* (1997) 733 ff.

⁹ The *Anweisender* or 'instructing party'.

¹⁰ The *Angewiesene* or 'instructed party'.

¹¹ The *Anweisungsempfänger* or 'recipient'.

¹² *Münchener Kommentar/Lieb* § 812 marg note 30. In other words, B can perform to C via an intermediary A, acting under B's instruction.

¹³ This is often translated as 'order' or 'instruction': see, e.g., Meier (1999) 58 *Cambridge Law Journal* 567 and Daniel Visser 'Searches for silver bullets: enrichment in three party situations'

banking law, for example, it is the device used to explain cheques and bank transfers,¹⁴ and, in enrichment law, it provides the archetype for all situations of three-cornered enrichment.¹⁵

The concept is not only fertile and versatile, but also mutable. Although certain core characteristics remain the same, the finer details differ from context to context. Even within one particular area, there might be differing opinions as to the exact scope and nature of the *Anweisung*. Thus, in the law of enrichment, while we find all writers discussing the *Anweisung*, there is no such unanimity as to what an *Anweisung* is, or which cases would fall within its purview.

A narrow version of the concept finds statutory expression in § 783 BGB,¹⁶ which deals with a written authorisation of performance that is banded to the person who

in David Johnston and Reinhard Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) at 526 ff at 540. It should more accurately called 'delegation': see the text at p 170 ff below. In the mean time, I will use the German terminology, to avoid confusion.

¹⁴ It should be borne in mind that, although the relevant paragraph of the BGB (§ 783) is the civil law basis for the law regarding cheques etc, most of the provisions regulating this area of the law do not form part of this code or of the *Handelgesetzbuch* (i.e. the Commercial Code) but are contained in other statutory enactments, starting with the Bills of Exchange Act (*Wechselgesetz*) enacted on 21 June 1933 and the Cheques Act (*Scheckgesetz*) of 14 August 1933: see Norbert Horn, Hein Kötz and Hans G Leser *German Private Law and Common Law: An Introduction* (transl Tony Weir) (1982) at 218. These two statutes were passed in response to the Geneva Conventions 'which unified the continental European Law on these subjects.' See Horn *et al op cit* 218-19.

¹⁵ Other examples of three-cornered enrichment: third party insurance, contracts for the benefit of third parties, life insurance, cession, pledge, suretyship, 'shortcut delivery', etc. See Chapter One at p 28.

¹⁶ This paragraph is contained in Chapter 21 of the BGB, which generally deals with written orders relating to the delivery of money, other fungible property or commercial papers. The paragraph reads thus: 'Händigt jemand eine Urkunde, in der er einen anderen anweist, Geld, Wertpapiere oder andere vertretbare Sachen an einen Dritten zu leisten, dem Dritten aus, so ist dieser ermächtigt, die Leistung bei dem Angewiesenen im eigenen Namen zu erheben, der Angewiesene ist ermächtigt, für Rechnung des Anweisenden an den Anweisungsempfänger zu leisten.' (If someone hands a third party a document in which he instructs another to give money, commercial papers or other fungible things to the third party, this third party is entitled to demand performance from the instructed party in his own name, and the instructed party is entitled to perform to the third party for the account of the instructing party.) An *Anweisung* made in terms of this provision is itself regarded as a form of commercial paper because the instructed party (drawee) need only perform upon presentation of the instrument. Thus cheques, postal orders, letters of credit are examples of *Anweisungen*. ('Commercial paper' is the term used by Malan and Pretorius *Bills of Exchange* as the English equivalent for 'Wertpapier' or 'waardepapier': see index and pp 4-5.)

should ultimately receive the object of the performance (which must take the form of money, fungible things, or commercial papers).¹⁷ For example, B, who holds an account at bank A, gives C a document which instructs the bank to pay €100 to C, and to deduct this sum from B's account. The most familiar example of such a document would be a cheque.¹⁸

The *Anweisung*, in this technical sense at least, gives rise to a 'double authorisation': upon presentation, it simultaneously authorises the instructed party (A) to perform to the recipient of the instrument (C) on behalf of the instructing party (B), and the payee (C) to collect the performance from the instructed party (A) in his own name.¹⁹ On the other hand, it does not create any obligations.²⁰ Thus the payee does not automatically acquire any *right* to claim performance from A,²¹ even if the instructed party is obliged to perform vis-à-vis the instructing party on the basis of an underlying relationship (e.g. a banker-client contract). An *Anweisung* can therefore be revoked by the instructing party.²² (The picture changes, however, if the drawee accepts the *Anweisung*, in which case there will be a so-called *angenommene Anweisung*.²³ In such

¹⁷ Medicus *Bürgerliches Recht* marg note 674.

¹⁸ The *Anweisung* in terms of § 783 BGB must be distinguished from various other legal concepts. While the third party is authorised to collect performance, this is not a cession because the third party does not generally receive transfer of the claim. An instruction to a bank to transfer money to a third party (an *Überweisungsauftrag*), a direct debit order (*Lastschriftverfahren*), and a postal transfer are not regarded as *Anweisungen* in this narrow sense. An *Anweisung* as defined by § 783 BGB must also be distinguished from a mandate (*Auftrag* in terms of §§ 662 ff BGB); for a comparison, see the discussion at p 169 below.

¹⁹ See, e.g., *Palandt Einf* vor § 783 marg note 3.

²⁰ In other words it is typically unilateral, and is not a contract. See, e.g., Köppensteiner and Kramer *Bereicherung* 24, where they also distinguish this from cases of co-debtorship or suretyship, where A (along with B) is obliged vis-à-vis C and thus makes a performance 'solvendi causa' in the relationship A-C.

²¹ And, while the instructed party has a duty (arising out of its underlying contract with the instructing party) to make a performance (A-B), it has no legal duty to make that performance to C.

²² Such as happens when someone countermands a cheque – see p 209 ff below. See *Palandt* § 790 marg note 1.

²³ See § 784 BGB: '[Annahme der Anweisung] (1) Nimmt der Angewiesene die Anweisung an, so ist er dem Anweisungsempfänger gegenüber zur Leistung verpflichtet; er kann ihm nur solche Einwendungen entgegensetzen, welche die Gültigkeit der Annahme betreffen oder sich aus dem Inhalte der Anweisung oder dem Inhalte der Annahme ergeben oder dem Angewiesenen unmittelbar gegen den Anweisungsempfänger zustehen. (2) Die Annahme erfolgt durch einen schriftlichen Vermerk auf der Anweisung. Ist der Vermerk auf die Anweisung vor der Aushändigung an den Anweisungsempfänger gesetzt worden, so wird die Annahme diesem gegenüber erst mit der Aushändigung wirksam.' ([Acceptance of *Anweisung*] (1) If the

circumstances, the drawee (A) is bound to perform to the payee (C)²⁴ upon presentation of the document containing the instruction. In other words, the payee will have a right against the drawee.²⁵ Acceptance, however, does not create a contract between A and C.²⁶)

It is also important to note that the principles of separation²⁷ and abstraction²⁸ apply to both authorisations.²⁹ In other words, their validity does not depend on the validity of any underlying legal transactions. So, for instance, if B instructs A to perform to C in circumstances where the underlying relationship between A and B is defective or absent, the instruction will nevertheless be valid. Let us imagine, for example, that B owes €100 to C in terms of a contract, and A owes €100 to B. B instructs A (in the form of a written document presented to C) to hand the sum directly over to C. B's instruction to A can constitute a valid *Anweisung* even if A's debt to B has prescribed or terminated, or if their contract was void or voidable from the outset.³⁰

Perhaps the most important feature of all, at least from an enrichment perspective, is that A's 'performance' to C is regarded as embodying two performances: A's performance to B, and B's performance to C. By means of this convenient legal fiction,³¹ A's and B's obligations are fulfilled and thus extinguished by one and the same

instructed party accepts the *Anweisung*, he is obliged vis-à-vis the recipient to make performance; he can raise against him only such defences as concern the validity of the acceptance or arise from the content of the *Anweisung* or the content of the acceptance or that are available to the instructed party directly against the recipient. (2) Acceptance takes place by a written note on the *Anweisung*. If the note is placed on the *Anweisung* before it is handed to the recipient, the acceptance is only effective vis-à-vis the recipient upon delivery of the *Anweisung*.)

²⁴ See *Palandt* § 784 marg note 1.

²⁵ See *Palandt* § 784 marg note 1.

²⁶ *Palandt* § 784 marg note 3.

²⁷ *Trennungsprinzip*.

²⁸ *Abstraktionsprinzip*.

²⁹ See *Palandt* Einf. Vor § 783 BGB marg notes 6-7: the validity of the *Anweisung* is independent of the *Valutaverhältnis* and the *Deckungsverhältnis*. Also see § 783 marg note 4.

³⁰ This partially explains why, when B draws a cheque on bank A, he is making a valid *Anweisung* even if A is not B's debtor in the sense that A owes B money (i.e. even if B's account has a nil balance, or a debit balance). In other words, even though the archetypal case envisages a debtor-creditor relationship between A and B, the application of the abstraction principle means that there can be a valid *Anweisung* even in the absence thereof.

³¹ See, e.g., Zimmermann *Law of Obligations* 159-60; D.12.1.15.

act.³² It is this feature that distinguishes the situation of an *Anweisung* from the situations discussed in the previous chapter. If A takes it upon herself to pay a debt owed by her impecunious sister (B) to C, A is regarded as performing to C. If, however, A pays the rent he owes to his landlord (B) to B's creditor C on B's instruction, A will be regarded as having performed to B, and B to C. Or, to use the computer example cited above, if B instructs a seller A to deliver a computer directly to B's contract-partner C, such delivery will discharge A's obligation to B, and B's obligation to C.

As said above, the *Anweisung* of § 783 BGB is just one manifestation of a much broader concept, and it is in its broader guise that it is used by writers on unjustified enrichment as the model for dealing with three-cornered enrichment situations.³³ Enrichment lawyers thus apply the rules outlined above to all cases where someone has been instructed to pay the instructing party's creditor (where the instruction or one of the other legal relationships between the parties is defective). *Anweisungen* in the context of enrichment, therefore, are not confined to instructions that are embodied in written documents; the performance in question need not be the delivery of money, securities or fungibles; and the instruction need not necessarily authorise the third party to collect from the drawee in his own name. The term 'Anweisung' in this broad sense would therefore include mandates,³⁴ postal orders,³⁵ inter-account bank transfers,³⁶ debit orders, cases of 'short-cut delivery', and so on.

The central role given to the *Anweisung* in the German legal literature on unjustified enrichment is justified by the fact that it is the most common three-cornered situation arising in practice,³⁷ and it has thus given rise to more litigation (and

³² In other words, for example, when A hands money to C in terms of B's instruction, A's debt to B and B's debt to C will both be discharged. Wieling *Bereicherungsrecht* 80: this corresponds to what happens in terms of property law. Cf the discussion of the *Geheißerwerb* in Chapter One at p 19.

³³ Medicus *Schuldrecht II* marg note 579: 'Mittel zur Erleichterung von Leistungen in Dreipersonenverhältnissen...'

³⁴ See, e.g., Wieling *Bereicherungsrecht* 88.

³⁵ Medicus *Schuldrecht II* marg note 579.

³⁶ See, e.g., Wieling *Bereicherungsrecht* 88n1.

³⁷ See Medicus *Schuldrecht II* marg note 581. It should be borne in mind that although many of the earlier German cases concern cheques, this mode of payment is now used relatively seldom in Germany; it has been superseded by *Überweisungen* (i.e. instructions to the bank to make a

consequently more case law) than any of the other situations covered in this thesis. That this is so is obvious especially if one bears in mind that all cheques and bank transfers³⁸ fall into this category.³⁹ It is also useful as an archetype because of its versatility, and its applicability in apparently disparate contexts.⁴⁰ Moreover, its somewhat fluid boundaries make it malleable and flexible, in that analogous cases may easily be brought within its compass.⁴¹ Finally, it provides a good basis for discussion because of the nature of the legal relationships (contractual or proprietary) linking the three parties.

The existence of actual or supposed contracts between the parties is important in determining who has 'performed' to whom. As said above, in terms of German law, the instructed party's 'handing over' (*Zuwendung*)⁴² comprises two performances:⁴³ within a banking context, for example, it constitutes the bank's performance in terms of its agreement with its client and the drawer's performance in terms of its contract with the payee.⁴⁴ This rule helps to locate the *causa* for a particular 'performance'. It also obviously plays a crucial role for the supporters of the *Leistungsbegriff*. Finally, as mentioned above, it distinguishes *Anweisung* cases from those where someone pays the debt of another (covered in the previous chapter): if A pays B's debt to C, his intention is to settle B's debt to C by his own performance to C; if, on the other hand, in accordance with an instruction (*Anweisung*) from B, A makes a payment to C, A does not intend to settle B's debt to C, but to settle his own debt to B,⁴⁵ and the extinction of B's debt to C follows almost incidentally, regardless of A's intention.⁴⁶

transfer to a third party, without any negotiability being attached to the written instruction), transfers made over the internet, and credit card payments.

³⁸ *Überweisungen*.

³⁹ Medicus *Bürgerliches Recht* marg note 674.

⁴⁰ Thus we find *Anweisungen* in banking law, insurance law, the law of sale and lease, etc.

⁴¹ As is shown by the fact that some authors regard a particular set of factual circumstances as constituting an *Anweisung*-case, whereas others regard exactly the same circumstances as merely analogous to the *Anweisung*.

⁴² See Chapter One at p 39.

⁴³ At p 165.

⁴⁴ Loewenheim *Bereicherungsrecht* 33; Jauernig/Schlechtriem § 812 marg note 34; R Zimmermann and J du Plessis 'Basic features of the German law of unjustified enrichment' 1994 *Restitution Law Review* 14 at 33.

⁴⁵ In other words, it is not a case covered by § 267 BGB. See, e.g., Koppensteiner and Kramer *Bereicherung* 31.

⁴⁶ In other words, it results from B's intention in making the instruction to A, and not from A's intention in making the payment.

According to Wieling,⁴⁷ this contractual pattern corresponds to that of the passing of ownership in such circumstances. He says that unless B expressly instructs A to transfer ownership directly to C, ownership will pass from A to B to C.⁴⁸ The reason given for this is that, in the absence of such an express instruction, A will not be sure exactly why B wants him to hand possession to C. For example, A might intend to retain ownership of the thing, (such as where he merely wants to lend it to C).⁴⁹ It seems, however, that ownership would also⁵⁰ pass directly from A to C where A hands cash to C. This would generally⁵¹ result in C's acquiring ownership of the money, in terms of the German equivalent of our principle of *commixtio*.⁵² A shift of assets directly from A to C could also occur by means of a credit against C's account at his own bank. It should also always be borne in mind that the transfer of ownership is not dependent on the validity of any underlying causal transactions, due the application of the principle of abstraction.⁵³

Unlike many other institutions of German law,⁵⁴ the *Anweisung*, especially in its

⁴⁷ *Bereicherungsrecht* 88.

⁴⁸ As happens with the *Geheißerwerb*: see Chapter One at p 19 above.

⁴⁹ For all of this, see Wieling *Bereicherungsrecht* 88. He adds that if A handed the thing to C, and the transfer of ownership by B to C was invalid for some reason, ownership would pass merely from A to B.

⁵⁰ In other words, even if B did not expressly instruct A to transfer ownership directly to C.

⁵¹ Unless the individual coins and notes can be separated from those of the recipient e.g. if the serial numbers had been recorded.

⁵² See § 948, read with § 947 BGB. § 948 (1) BGB 'Werden bewegliche Sachen miteinander untrennbar vermischt oder vermengt, so finden die Vorschriften des § 947 entsprechende Anwendung. (2) Der Untrennbarkeit steht es gleich, wenn die Trennung der vermischten oder vermengten Sachen mit unverhältnismäßigen Kosten verbunden sein würde.' [(1) If movable things are inseparably mixed or mingled with each other, the provisions of § 947 apply *mutatis mutandis*. (2) For the purposes of inseparability, it is irrelevant whether the separation of the mixed or mingled things would entail disproportionately high costs.] § 947 (1) BGB 'Werden bewegliche Sachen miteinander dergestalt verbunden, daß sie wesentliche Bestandteile einer einheitlichen Sache werden, so werden die bisherigen Eigentümer Miteigentümer dieser Sache; die Anteile bestimmen sich nach dem Verhältnisse des Wertes, den die Sachen zur Zeit der Verbindung haben. (2) Ist eine der Sachen als die Hauptsache anzusehen, so erwirbt ihr Eigentümer das Alleineigentum.' [(1) Should movable things be joined in such a way that they become component parts of a unified thing, the former owners become co-owners of this thing; the shares are determined with reference to the value that the things had at the time of joining. (2) If one of the things is to be regarded as the main thing, the owner thereof will acquire sole ownership.]

⁵³ See Chapter One at p 17 ff.

⁵⁴ E.g. *Geschäftsführung ohne Auftrag* (*negotiorum gestio*), *Abtretung* (*cession*), *Bürgschaft*

narrow sense, is not immediately recognisable to a South African lawyer. The instruction given by B to A superficially resembles our contract of mandate. But this resemblance is illusory. Just one distinction, for example, lies in the fact that a mandate is necessarily bilateral, whereas an *Anweisung* may, but need not be, accepted by the instructed party (in fact, it is typically unilateral). In short, a mandate is a contract, whereas an *Anweisung*, in its narrow guise, is not.⁵⁵ Typically, where there is an *Anweisung*, the instructing and the instructed parties are linked by an underlying contract (e.g. sale of the computer in the first example above, or the banker-client contract in the second, or the contract of insurance in the third), but the *Anweisung*, though related,⁵⁶ does not form part of the contract itself. This is shown by the fact that the *Anweisung* is usually made *after* A and B have concluded their contract. Moreover, unlike a mandate, an *Anweisung* is not a source of obligation.⁵⁷ Thus, for example, in contrast to a mandate, an *Anweisung* does not itself⁵⁸ oblige the instructed party to make the performance in question; it merely authorises the deflection of a performance owed in terms of the underlying contract. That mandate and *Anweisung* are mutually exclusive legal institutions in German law⁵⁹ is also indicated by the fact that a mandate (*Auftrag*) is necessarily gratuitous,⁶⁰ whereas an *Anweisung* can be carried out for remuneration.⁶¹

It should also be borne in mind that we are dealing not merely with an instruction, but also with an authorisation. Not only does B instruct (and therefore authorise) A to perform to C, but he also authorises C to accept A's performance as

(suretyship), modes of transfer of ownership, the doctrine of subjective rights.

⁵⁵ While an *angenommene Anweisung* is accepted by the instructed party (drawee), and is bilateral in that sense, it is still not a contract: see p 165 above.

⁵⁶ In that the instruction relates to the performance owed in terms of that contract.

⁵⁷ Unless it has been accepted by the drawee: an *angenommene Anweisung* in terms of § 784 BGB.

⁵⁸ Although perhaps the underlying contractual relationship could effectively require acceptance of the *Anweisung*.

⁵⁹ At least in the narrow technical sense of § 783 BGB. In the broader sense in which it is used by enrichment law, mandate would be embraced by the concept – see, e.g., definition of *Anweisung* by Wieling *Bereicherungsrecht* 88. The German *angenommene Anweisung* is closer to our mandate in that it is bilateral (in that the instruction is accepted by the instructed party) and creates an obligation to perform. It should be borne in mind, however, that acceptance in such circumstances does not create a contract: *Palandt* § 784 marg note 3.

⁶⁰ § 662 BGB; Medicus *Schuldrecht II* marg note 417. It was also (at least nominally) gratuitous in Roman law: see Zimmermann *Law of Obligations* 415 ff. Cf South African law, at least in a banking context: see J C Stassen 'Driepartybetalingsmechanismes in die moderne bankreg: die regsaaard van die verbouding tussen bank en klient' 1980 *Modern Business Law* 77 at 80.

⁶¹ For example, bank charges.

being from B. In carrying out the performance on behalf of B, is A acting as his agent? Again, the answer must be no. For A does not take B's place, but makes B's performance in his own capacity. There are, legally-speaking, three parties, and not merely two as there would be in a case of agency. Similarly, C cannot be seen as acting as B's agent in accepting performance from A on B's behalf: C accepts performance in his own capacity, in fulfilment of a debt owed to him by B. Again, therefore, it has to be accepted that we are dealing with three parties and that C is not merely a representative of B.⁶²

Although there are points of resemblance, therefore, neither mandate nor agency corresponds exactly to the German *Anweisung*. Tracing the concept back to Roman law, which provides not only the common ancestor of South African and German law but also a common 'language' of legal concepts, provides South African lawyers with the key to understanding the *Anweisung* as it is applied in modern German law.

Roman law: *delegatio*

In Roman law, there were various forms of *delegatio*. It was a type of authorisation,⁶³ a 'unilateral informal declaration that one was prepared to acknowledge the act of a third party'.⁶⁴ It could thus be used to assume an obligation or to authorise a payment.⁶⁵

⁶² A further distinction between agency and an *Anweisung* is that agency, like mandate, is a bilateral legal relationship.

⁶³ See Kaser *Roman Private Law* at 269; *idem Das römische Privatrecht: Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht* 2 ed (1971) at 650: 'Die Delegation ist ein Anwendungsfall der Ermächtigung....' The technical term for authorisation in this sense was *iussum*, but it was sometimes more loosely called *mandatum*: Max Kaser *op cit* at 265n41, 579 and 650; Zimmermann *Law of Obligations* 61. It was not an instance of *mandatum* proper, because it was not a contract.

⁶⁴ Kaser *Roman Private Law* at 269. *Iussum* or 'authorisation' was also used to effect indirect representation: see Kaser (n 63) (1971) 265; Zimmermann *Law of Obligations* 49. Zimmermann *loc cit* points out that *iussum* differed from the modern authorisation of an agent by a principal in that 'it had no "external effect": it did not give rise to a contractual relationship between the "principal" and the party with whom the "agent" contracted.' (Also see Kaser *Roman Private Law* at 230 in this regard.) *Iussum* also helped to fill the space in Roman law occupied in modern legal systems by agency in that it was one of the devices used to make the *paterfamilias* liable for acts concluded by a person within his power: 'an express (formless) authority ... had to have been communicated to the party with whom the person in power was about to contract...' in order to found the *actio quod iussu*: Zimmermann *Law of Obligations* 52; also see Kaser *Roman Private Law* at 248. On the post-classical law in this regard, see Kaser *Roman Private Law* at 70.

⁶⁵ Kaser (n 63) at 650.

The specific instance of the Roman *delegatio* that might seem somewhat familiar to South African lawyers is the *delegatio obligandi*, or 'delegation of obligations'. Here, one party authorised another to assume an obligation vis-à-vis a third party.⁶⁶ In other words, it was a device used to effect substitution of a party to an obligation. It could take either of two forms, depending on which of the parties to the original obligation was substituted: active delegation involved a change of creditors whereas passive delegation involved a change of debtors. To achieve active delegation of obligations, the original creditor would authorise the debtor to assume an obligation towards the new creditor.⁶⁷ To bring about passive delegation of obligations, on the other hand, the original debtor would authorise the creditor to assume an obligation towards a new debtor. *Delegatio obligandi* was thus used by the Romans in order to arrive at the same results as our cession⁶⁸ and 'assignment of debts'.⁶⁹ It differed from modern South African law, however, in that it required the co-operation of the party who was to be substituted⁷⁰ and in that it required novation of the original obligation.⁷¹ The reason why

⁶⁶ This assumption of obligations usually entailed a novation of the original obligation: see Zimmermann *Law of Obligations* 60, for the law regarding a change of creditors ('active delegation'). Also see Kaser (n 63) at 650, where he points out that *delegatio* was bound together with novation by Justinian because *delegatio obligandi* led to a novation. The new contract restated the terms of the original obligation, except that the name of the new party would be substituted for the old: see Zimmermann *Law of Obligations* 60 and Kaser (n 63) at 647. Cf Kaser *Roman Private Law* 270: *Delegatio obligandi* took place by way of *stipulatio* or *dotis dictio*. If the parties referred to the original obligation in the *stipulatio*, there usually had to be a novation of the obligation to effect substitution of the authorised party for the original debtor or creditor. If, on the other hand, the *stipulatio* did not refer to the original obligation, it appears that no novation was necessary; the assignee made an abstract promise to the third party (e.g. to give him a specific amount of money), 'which was effective in relation to the assignor by virtue of his authorisation'.

⁶⁷ See Zimmermann *Law of Obligations* 60, where the relevant *formulae* are quoted.

⁶⁸ Regarding the post-classical Roman law, see, e.g., Max Kaser *Das römische Privatrecht. Zweiter Abschnitt: Die nachklassischen Entwicklungen* 2 ed (1975) at 451 (where he states that the economic need for exchange of creditors was adequately met by various devices, including active delegation) and 453 (where he mentions that Justinianic law still regarded substitution of debtors as only being possible by way of passive delegation and *procuratio in rem suam*).

⁶⁹ See Van der Merwe *et al Contract* 504 ff, where this terminology is used to refer to substitution of debtors without novation, whereas the term 'delegation' is to denote something similar to the Roman passive *delegatio obligandi*, as in the following phrase at 504-5: 'delegation involving a novation of the existing obligation'.

⁷⁰ See Zimmermann *Law of Obligations* 60 for a discussion of this and other disadvantages of using the *delegatio obligandi* to achieve the results of cession.

⁷¹ Cf footnote 66 above, regarding the 'abstract *stipulatio*' discussed by Kaser. The fact that *delegatio solvendi* (usually) entailed a novation was not only inconvenient but also resulted in the lapsing of any rights accessory to the original obligation. These accessory rights would therefore

the Romans never accepted that rights and duties could be transferred to third parties without the co-operation of the original parties⁷² was their deeply-rooted conviction that obligations were personal.⁷³ The *delegatio obligandi* was also used for other purposes. Thus, for example, it was used to meet the practical need for a contract in favour of third parties,⁷⁴ which was also prevented by the rules which conserved the personal nature of obligations.⁷⁵

Perhaps less familiar to South Africans is the other form of *delegatio* developed by the Romans: *delegatio solvendi*.⁷⁶ This was 'an authorisation to pay'⁷⁷ in terms of which B (*is qui delegat*) authorised A (*is qui delegatur*) to perform to a third party (*is cui delegatur*).⁷⁸ A creditor could thus authorise his debtor to discharge his (the debtor's) obligation by performing to a third party; or a debtor could authorise a third party to perform to his (the debtor's) creditor.⁷⁹ In other words, it allowed the debtor to fulfil his contractual obligation⁸⁰ by performing to a third person⁸¹ or via a third person.⁸² As

have to be re-established in relation to the new obligation: see Zimmermann *Law of Obligations* 60. Modern South African law clearly does not require novation for the substitution of creditors by cession: see the discussion in Chapter Four below. The traditional approach of South African law regarding substitution of debtors, on the other hand, was that this was not possible without a novation: see Van der Merwe *et al Contract* 504-5; *Froman v Robertson* 1971 (1) SA 115 (A). In *Botha v Van Niekerk* 1983 (3) SA 513 (A), however, it was held that there was no need for novation, but that the creditor had to consent to the transfer of the duty: see *S v Commissioner of Taxes* 1984 (3) SA 584 (ZS); *Wildrice Investments (Pty) Ltd v Commissioner for Inland Revenue* 1987 (1) SA 247 (T); *Mignael Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A); *Hodges v Coubrough NO* 1991 (3) SA 58 (D); Van der Merwe *et al Contract* 505 ff.

⁷² *Nomina ossibus inhaerent*: Zimmermann *Law of Obligations* 58 ff.

⁷³ See Zimmermann *Law of Obligations* 5, 34 ff.

⁷⁴ Zimmermann *Law of Obligations* 39.

⁷⁵ Specifically, *alteri stipulari nemo potest*: see Zimmermann *Law of Obligations* 34 ff.

⁷⁶ German: *Zahlungsanweisung* – see Kaser (n 63) at 650.

⁷⁷ Kaser (n 63) at 650: it was usually money, but there is authority for *delegatio* of *operae* and *usufructus*.

⁷⁸ Kaser *Roman Private Law* at 269-70. This also entailed that C was authorised to accept the performance of A as emanating from B: Kaser (n 63) at 650n34; D 46.3.56.

⁷⁹ Paul D.46.3.56; Kaser *Roman Private Law* at 270; *idem* (n 63) at 650-1.

⁸⁰ See A M Honoré 'Condictio and payment' 1958 *Acta Juridica* 135 at 138, where he suggests that the Romans regarded the provision of a 'delegate' as 'equivalent to payment'.

⁸¹ In other words, where A owed a performance to B, he could discharge his obligation by performing to C. See, e.g., Kaser *Roman Private Law* at 261, where he refers to the *delegatio solvendi* in his chapter on 'performances and other modes of extinction', in the list of persons, other than the creditor, who were entitled to accept performance: 'If the creditor authorised the debtor to make performance to a third person ..., the debtor could release himself by making performance to the third person. He was released even without such authorisation if the creditor subsequently ratified the performance to the third party (*ratihabitio*; Ulp D.46.12.4).'

⁸² In other words, where B owed a performance to C, he could discharge it by instructing A to make

with the modern German *Anweisung*,⁸³ the performance in question was, by way of fiction, 'regarded as being made by [A] to [B], and by the latter to the third party....'⁸⁴ This legal construction, by imagining two legal performances where there was factually only one, obviated the need for two performances in a literal sense.⁸⁵

This characteristic, in particular, made the *delegatio solvendi* a very useful device. For example, it was used by the Romans to avoid some of the drawbacks of the 'real' nature of the contract of *mutuum*.⁸⁶ Originally, *mutuum* (loan for consumption) required that the lender transfer ownership of the coins, in the case of a money loan, directly to the borrower.⁸⁷ In other words, it required a *datio* from the lender to the borrower.⁸⁸ This was obviously inconvenient, and did not allow the credit transfers necessary for the development of commercial banking.⁸⁹ *Delegatio solvendi* provided the answer: a creditor (B) could instruct his debtor (A) to pay the third party (C) to whom the creditor wanted to lend the money, thus giving rise to a contract of *mutuum* between the creditor and the third party.⁹⁰ Although A handed the money to C, it was regarded as performance by A to B, and B to C,⁹¹ and hence two *dationes*;⁹² the law thus simultaneously (ostensibly) adhered to the original requirements of *mutuum* and met a practical need.⁹³

It should also be borne in mind that the remedy afforded to a lender who wanted

the performance in question.

⁸³ The German word 'Anweisung' is apparently the equivalent of the Latin 'delegatio': see Kaser (n 63) at 650, where he writes, 'Die Anweisung (*delegatio*)' Also see Medicus *Schuldrecht II* marg note 579.

⁸⁴ This construction stemmed from Celsus: Zimmermann *Law of Obligations* 159-60 and Kaser (n 63) at 651 (where he refers to this as the 'Durchgangstheorie').

⁸⁵ See Zimmermann *Law of Obligations* 159-60 on the importance of this fiction.

⁸⁶ It was also employed for purposes other than discharge of obligations and the granting of a loan (*mutuum*); it could be used to constitute a dowry or effect a donation: Kaser *Roman Private Law* at 270. Kaser (*op cit* at 261) says that it was one of the means used to meet the practical need for a genuine contract for the benefit of third parties.

⁸⁷ Zimmermann *Law of Obligations* 158.

⁸⁸ Zimmermann *Law of Obligations* 153.

⁸⁹ Zimmermann *Law of Obligations* 159.

⁹⁰ D 12.1.15; Zimmermann *Law of Obligations* 159.

⁹¹ Zimmermann *Law of Obligations* 159.

⁹² Zimmermann *Law of Obligations* 161.

⁹³ See Fritz Schulz *Principles of Roman Law* (1936) on Roman pragmatism, the conservative nature of Roman law and economy of legal forms.

to reclaim his money from the borrower was a *condictio* (i.e. an *actio certae creditae pecuniae*).⁹⁴ By implication,⁹⁵ therefore, when money was lent to a third party using *delegatio solvendi*, not only were there two *dationes*, but these would give rise to two *condictiones*: should the money not be repaid, A had to bring a *condictio* against B, and B in turn had to bring a *condictio* against C. In other words, the pattern of the *condictiones* presumably followed the pattern of the *dationes*. This is borne out by the fact that, according to Kaser, in a case of *delegatio solvendi* where the relationship between A and B was defective, A would have to sue B with a *condictio* (i.e. A would sue B, not C).⁹⁶

Before turning to the South African law, several factors should be emphasised. Firstly, the Romans drew a distinction 'between the authority as such (*iussum*) and the causal transaction giving rise to the granting of such authority.'⁹⁷ Secondly, such authorisation was sometimes loosely called mandate, although this was technically incorrect.⁹⁸ Thirdly, both forms of *delegatio* were employed by the Roman 'banking industry'.⁹⁹ Fourthly, *iussum* in the form of *delegatio* was used to avoid the practical disadvantages caused by the view that obligations were inherently personal; thus it was used to achieve the practical results of cession, assignment of debts, and contracts in favour of third parties.¹⁰⁰ Fifthly, the *delegatio solvendi* was vital to the development of our modern contract of *mutuum*. Finally, the view that the *delegatio solvendi* resulted (fictionally) in two legal performances was of great significance for the development of

⁹⁴ Zimmermann *Law of Obligations* 153.

⁹⁵ I have not found authority for this specific point, but it follows logically from the fictional double *datio*.

⁹⁶ Kaser (n 63) at 651 n 37: a defect in the *Deckungsverhältnis* does not prevent C from acquiring the performance, but gives A a *condictio* against B: D 12.4.9.1; D 16.1.8.2; D 23.3.78. Regarding a defect in the *Valutaverhältnis*, see D 24.1.3.12. There need not always have been an obligation B–C, however, as in the case where a creditor instructed his debtor to perform to a third party (to whom, for example, he might merely have wished to make a donation).

⁹⁷ Zimmermann *Law of Obligations* 61 n 194, where he gives the following as examples of such a causal transaction: 'the purchase of a claim (or, in the case of *procuratio in rem alienam* a *mandatum stricto sensu*.)'

⁹⁸ Cf note 59 above. E.g. sometimes the underlying causal transaction was mandate.

⁹⁹ Kaser (n 63) at 650: the 'Bankwesen' of the late Republic and the principate. He points out that although this industry was influenced by hellenism, *delegatio* was a specifically Roman legal institution.

¹⁰⁰ And, in a broader sense, *iussum* was used to bring about indirect representation and liability of the *paterfamilias* for acts of another (in place of our agency).

both Roman law and modern civilian legal systems: it is 'still fundamentally important for the modern law of unjustified enrichment....'¹⁰¹

So here is the elusive *Anweisung*. The next question is whether the *delegatio solvendi* lives on in modern South African law, or whether it has disappeared entirely.

South African law¹⁰²

At least two modern judgments¹⁰³ suggest that it survives, although we might have forgotten its name: *Minister van Justisie v Jaffer*¹⁰⁴ and *The Standard Bank of South Africa Ltd v Haskins*.¹⁰⁵

In *Jaffer*'s case, a drug dealer, who was, according to the judge (E M Grosskopf

¹⁰¹ Zimmermann *Law of Obligations* 159-60.

¹⁰² This is not intended as an exhaustive discussion of the topic, which would fall outside the scope of this thesis, but rather as background to the discussion of enrichment law which follows. A more detailed consideration of the *delegatio solvendi* in the common law and modern South African law will be the subject of an article to be published later.

¹⁰³ Cf also *Resnik v Lekhetsoa* 1950 (3) SA 263 (T): B sold his general store to A. The purchase price was the amount owed by B to his creditors (C). A paid two of these creditors directly. In an action for the balance of the purchase price, the Native Appeal Court held that the amount owed to one creditor, CX, was still outstanding and gave judgment for the plaintiff (B) in this amount. A therefore paid CX the outstanding amount and informed Resnik, B's attorney, of this fact. B subsequently ceded 'all his right, title and interest in the judgment in the Native Court' to Resnik. Resnik then sued A for payment in the Magistrate's Court. The Magistrate decided in favour of A, and Resnik appealed against this decision. The court said that the original agreement between B and A required A to pay B's creditors, and while it had as a matter of strict law been novated by the judgment of the Native Appeal Court, B should have warned A if he wanted payment to himself and not to CX. The judge said that 'principles of the *exceptio doli* ... seem very apposite' but went on to hold that '[w]hether the principles of the *exceptio doli* are applied or the rule [that payment to a creditor's creditor will be a valid payment if it benefits the creditor] ... in my judgment the magistrate correctly gave judgment for the defendant and it becomes unnecessary to consider whether the respondent paid as *negotiorum gestor*....' See the commentary by J E Scholtens 'Payment to one's creditor's creditor' (1950) 67 SALJ 315. While he apparently agreed with the result of the judgment, he disputed the translation of the text relied on by the court in coming to its conclusion. He argued that payment to a creditor's creditor would only be a valid payment if made with the consent of the creditor or if 'his affair has been usefully managed by me though unknown to him.' (at 315). The word actually used by Voet in this passage was *voluntas*, which, being broader than mere consent, would cover an instruction: a performance made under instruction would surely be in accordance with the will of the creditor. Also see *Licences and General Insurance Co v Ismay* 1951 (2) SA 456 (EDL), which will be dealt with at p 203 ff below.

¹⁰⁴ 1995 (1) SA 273 (A).

¹⁰⁵ A decision of the CPD: *Standard Bank of South Africa Ltd v Haskins* (C) Case No 4688/1990 11 April 1991, unreported.

JA), a 'glibberige kalant',¹⁰⁶ was allowed out of prison on R30 000 bail paid by his brother, Mohammed Hoesein, who received a receipt for the payment. Later, a Mr Jaffer accompanied Hoesein to the court to collect the bail. Jaffer, an attorney, was one of the drug dealer's creditors. He requested the relevant official to pay the bail, not to the depositor Hoesein, but to himself, indicating that he had lent the money to one of the Hoeseins.¹⁰⁷ The official was reluctant to do this because the relevant statutory provision¹⁰⁸ specifically stated that bail may only be paid back to the accused or the depositor thereof, notwithstanding the fact that it may be ceded to another person.¹⁰⁹ In order to get around this problem, Hoesein made an endorsement on the receipt, in terms of which payment was to be made to Jaffer. The bail was accordingly paid, not to Mr Hoesein, but to Jaffer. It later emerged that the bail had been repaid in error as, unbeknown to the official in question, the drug dealer was free at the time.¹¹⁰

The part of the judgment that is most interesting for present purposes is the way in which the judge deals with the 'endorsement'. He says that Hoesein 'tried to have the money (or cheque) actually handed over'¹¹¹ to Jaffer and 'endorsed the receipt as evidence of this request'.¹¹² He adds that it was 'a mere authorisation to the Registrar to make payment in a particular manner, namely by means of a cheque to [Jaffer]'.¹¹³ Declining to follow the court *a quo*, which had treated it as a cession,¹¹⁴ he says that the parties did not intend to grant Jaffer an exclusive right to claim the bail in the future without Hoesein's co-operation.¹¹⁵ 'All that was at issue,' he adds, 'was the manner in which performance should take place.' Citing the well-known case of *Baker v Probert*¹¹⁶ as authority, the judge held that '[i]t is settled law that payment can be made

¹⁰⁶ At 276G of the judgment. For a summary of the judgment see D P Visser 'Unjustified enrichment' 1994 *ASSAL* 221.

¹⁰⁷ At 277D.

¹⁰⁸ Subsection 69(2) of the Criminal Procedure Act 51 of 1977.

¹⁰⁹ See 277F-H.

¹¹⁰ See 276F.

¹¹¹ At 279J (my translation).

¹¹² *Ibid.*

¹¹³ 280A (my translation).

¹¹⁴ 280A (my translation).

¹¹⁵ 280B.

¹¹⁶ 1985 (3) SA 429 (A) at 4381. *Baker v Probert* concerned the sale of a share block in a company. According to a mandate from the seller, Baker, a firm of estate agents, York Estate & Investment

to a creditor by handing the money over to the person whom he has authorised (his *gemagtigde*).¹¹⁷ In other words, A can perform to B by paying C, where B has authorised C to accept performance. He then went on to hold that A can perform to B by paying C, where B has authorised A to make that performance.

Baker's case concerned payment by a debtor to the creditor's agent. Was C acting as B's agent in accepting performance in *Jaffer's* case?¹¹⁸ In both cases a party apparently made a payment to someone other than his original creditor: a purchaser Probert (A) paid York Estate (C) rather than the seller Baker (B); the registrar (A) paid Jaffer (C) rather than the depositor Hoesein (B). In both cases, too, B made an 'authorisation' or instruction.

There, however, the similarity ends. In *Jaffer's* case, the authorised or instructed party was the party who made the payment (the registrar, A) whereas *Baker's* case represents the flip-side of the coin: the authorised or instructed party was the *recipient* of the payment (York Estate, C).

Co, found a buyer, Probert. A written contract of sale was duly signed by the parties. The contract specified that the parties should direct their respective performances to York Estate. The purchaser was accordingly to pay the purchase price to York Estate, and the seller to deliver to York Estate the relevant documentation relating to the share block and its transfer. The estate agent was required to release the purchase price to the seller only upon his delivery of the documentation. While the purchaser duly handed over the purchase price, the seller never delivered the documentation. After a year, the purchaser validly cancelled the contract for breach. A mere eight days later, York Estate was liquidated and the purchaser received no dividend despite having proved a claim (in the amount of the purchase price) against the liquidated estate. Ms Probert thereupon instituted an action against Mr Baker for the repayment of the purchase price. The court *a quo* (per Nienaber J, as he then was) held that her claim was one for damages for breach of contract, and decided the case in Ms Probert's favour. The appeal court considered that Ms Probert's claim was the normal contractual claim for restitution following upon cancellation for breach, and neither a claim for damages nor a *condictio*. The court confirmed that Mr Baker had to pay the purchase price to Ms Probert, but held that this was because York Estate had acted as Baker's agent (in terms of a contract of mandate between them) in receiving it and 'payment to an agent is equivalent in law to payment to the principal'. Upon cancellation Mr Baker thus had to return to the purchaser what he had legally received when she banded the money to his authorised agent. (The majority of the court also expressly rejected the seller's arguments that York Estate had acted as a stakeholder, and that there was an implied term requiring York Estate to repay the purchase price to Ms Probert in the event of breach of the contract of sale.)

¹¹⁷

280B-C (my translation).

¹¹⁸

As suggested by the English version of the headnote to *Jaffer's* case: 'It is settled law that payment can be made to a creditor by the handing over of the money to his agent.' (at 274E).

Moreover, in *Baker's* case, Probert (A) was obliged to make the payment to York Estate (C) in terms of the contract of purchase and sale between herself and Baker (B). The registrar in *Jaffer's* case, on the other hand, was under no contractual obligation to make the payment to C; the contract between himself (or his principal, the Minister of Justice) and B (supposedly) obliged him to pay the deposited sum to the depositor B. When he made the payment to C instead, he was doing so not in terms of a contract between himself and B, but in terms of a subsequent instruction or authorisation by B.¹¹⁹

The most crucial difference between the cases is that while *Jaffer's* case concerned A's payment to his creditor's creditor, it was held in *Baker's* case that A made the payment to his creditor's mandatory or agent. In other words, the authorisation in *Baker's* case amounted to a conferral of agency. As B's mandate to C was a valid one, C received the payment as his agent or representative. C thus received the payment *on behalf of* B. As the Appellate Division quite correctly pointed out, 'payment to an agent is equivalent in law to payment to the principal'.¹²⁰ A's handing the money to C therefore amounted to a payment to B. There were, thus, legally speaking, only two parties to the transaction (A and B), and C was a mere conduit for this payment.

In *Jaffer's* case, on the other hand, it does not appear that C acted as B's agent in receiving the payment. C arguably received the payment in his own name, and not on behalf of B. If C was not B's agent, A's payment to C could not amount to a payment to B. When the judge in *Jaffer's* case says that 'payment can be made to a creditor by handing the money over to the person whom he has authorised' (his *gemagtigde*), it

¹¹⁹ Focusing on the obligatory relationship between B and C highlights another factual difference between the cases. While party A in both cases at least supposedly owed something to B (Probert owed Baker the purchase price and the registrar owed Hoesein the deposit), the relevant duty (i.e. the duty between B and C extinguished by the payment in question) in the relationship B–C differs: C owed a duty to B in Baker's case (York Estate was obliged to receive and hold Probert's payment), whereas B owed a duty to C in Jaffer's case (Hoesein had to repay what he had borrowed from Jaffer). In other words, in Baker's case, B is creditor of A and C whereas, in Jaffer's case, B is creditor of A, and C is the creditor of B. This becomes clear when we consider which liabilities are extinguished by the payments in question: in Baker's case, the payment A–C extinguished A's debt to B and C's debt to B; in Jaffer's case, however, the payment A–C extinguished A's debt to B and B's debt to C.

¹²⁰ See the judgment of Botha JA at 438f.

appears that he took the principle in *Baker v Probert* a step further. Whereas *Baker v Probert* focused on B's authorisation of C to accept performance, *Jaffer's* case concerned B's authorisation of A to make performance to C.

In my opinion, the authorisation in *Jaffer's* case amounted to a *delegatio solvendi*, or an *Anweisung*. *Jaffer's* case concerned an *Anweisung* in a general context;¹²¹ what is also needed is authority for an *Anweisung* in banking law. This is provided by the unreported case of *The Standard Bank of South Africa Ltd v Haskins*.¹²²

Although the surrounding circumstances in *Haskin's* case were far removed from drug dealing and the criminal courts, the case also concerned someone who sounds rather a rogue, although it appears that he had an excuse for his errant behaviour. Mr Haskins supposedly incurred various debts in order to do 'some queer things',¹²³ including purchasing a house for R1,9 million and a Rolls Royce for R660 000. Ultimately, he owed Standard Bank R61 000 in terms of two contracts of suretyship, and he had an overdraft of R113 000. It appears that, at the time in question, Haskins had been 'unable to incur contractual obligations' as he was insane. The bank accepted that he had had no contractual capacity and therefore proceeded against him on the basis of unjustified enrichment. The rest of this excellent judgment will be discussed in detail elsewhere,¹²⁴ but what is most interesting in the present context is the judge's statement that '[c]heques and credit cards have this in common: they are instructions by a customer to his banker to pay his, the customer's creditor.'¹²⁵

It seems that statements such as these are not mere glimmers of a distantly perceived historical feature, but isolated expressions of a principle that simply needs elucidation. That there is a need to give it a more prominent role may be illustrated by two examples. A survey of the leading works on the South African law of negotiable instruments indicates that, while there is ample discussion of the negotiability of a

¹²¹ And *Ismay's* case concerned an *Anweisung* in the context of insurance liability.

¹²² *Supra*.

¹²³ Per Conradie J (as he then was).

¹²⁴ See the discussion of *Doppelmangel* in section 3 below.

¹²⁵ See p 5 of the typewritten judgment.

cheque, there is not as much clarity concerning various aspects of the relationship between the banker and its client.¹²⁶ In South African law, it is unclear what type of contract exists between banker and client: while some hold that it is a contract *sui generis*,¹²⁷ others argue that it is a type of mandate.¹²⁸ Although a distinction is drawn between the banker-client contract and the cheque itself, there also seems to be a lack of certainty as to the nature of the cheque and the juristic effects of the bank's payment in terms of a cheque. Whilst one must bear in mind that our banking law has an English, rather than Roman-Dutch pedigree, the *delegatio solvendi* provides a useful analytical tool for deepening our understanding of the legal implications of such transactions.

A second example which may be used to illustrate the usefulness of this concept as an analytical device is *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd*.¹²⁹ It will be remembered that, in this case, Taylam instructed his bank to pay the builders whom he had appointed to construct a shopping centre. Prior to payment, he revoked this instruction. The judge could thus have treated the case in the same way as those concerning countermanded cheques, instead of resuscitating the controversial *domino prohibente* rule.

In the present context, one is faced with the following difficulty: how can one compare South African law with an area of German enrichment law that revolves around a fundamental and pervasive concept that is, at best, a rather ghostly presence in South African law? Bearing in mind that '[i]ncomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function',¹³⁰ how can the German *Anweisung* be compared with something that could be a functional equivalent but that is not clearly developed in South Africa? In the circumstances, the

¹²⁶ See p 187 below.

¹²⁷ E.g. Denis V Cowen and Leonard Gering *The Law of Negotiable Instruments in South Africa* 4 ed (1966) 368.

¹²⁸ For example, Malan and Pretorius *Bills of Exchange* 336; Stassen 1980 *Modern Business Law* 77 at 79-80; L Tager 'Negotiable Instruments' (revised by H Daniels) *LAWSA* vol 19 First Reissue (1996) para 154.

¹²⁹ 1979 (2) SA 383 (C). See the discussion of this case in Chapter Two above at p 123 ff. Also see p 216 ff below.

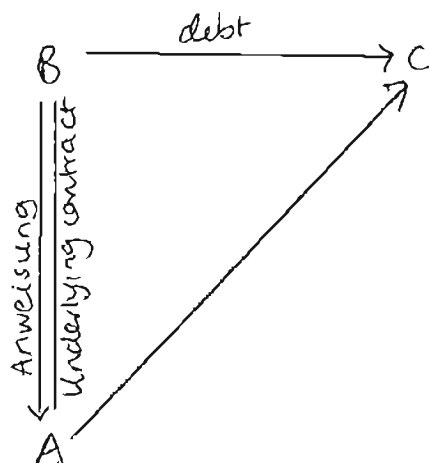
¹³⁰ Zweigert and Kötz *An Introduction to Comparative Law* 3 ed (transl Tony Weir) (1998) 34 and see Chapter One at p 51.

best approach seems to be to select a particular practical problem common to both systems and to consider the solutions they offer, and the routes that they take to arrive at these solutions.¹³¹ The most common situations falling within this category might be said to be those involving cheques.¹³² The following situation will therefore be used as the focus of the following discussion, bearing in mind that it is merely one of a range of possible analogous problems:¹³³ B draws a cheque¹³⁴ on his bank A, thereby instructing it to pay C (his creditor or the person to whom he wishes to make a donation or other gratuitous payment). The parties¹³⁵ involved would therefore be the bank,¹³⁶ its client¹³⁷ and the payee¹³⁸ of the cheque, (or the ultimate possessor¹³⁹ of the document itself).¹⁴⁰ Various factual permutations could arise, depending on the validity or otherwise of the different relationships between the parties, and these will now be dealt with in turn.

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- ¹³¹ Cf Zweigert and Kötz's comments (*An Introduction to Comparative Law* 3 ed (trans) Tony Weir) (1998) at 34) regarding the 'functional' comparative law approach. It should be borne in mind, however, that it is sometimes difficult to divorce legal concepts from the practical situations e.g. how can one explain what happens in a cession without reference to the rights involved?
- ¹³² Although this is something of an overstatement: in present-day Germany, cheques are rarely used, and in South Africa, litigation in this field is surprisingly sparse. Cf the comments of Preiss J in *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA (T) 41 at 44: 'I would have thought that the issues in the stated case would have been dealt with in numerous reported decisions. To my surprise I have ascertained ... that there are only two cases in which this specific issue has arisen for decision.' See also Eiselen and Pienaar *Unjustified Enrichment* 195. Some of these will be dealt with where necessary e.g. where there is an apposite case.
- ¹³³ That is, in South African terms, 'unconditional order in writing addressed by one person to a banker, signed by the person giving it, requiring the banker to pay on demand a sum certain in money to a specified person or his order or to bearer.' Tager (n 128) para 5; Bills of Exchange Act 34 of 1964 subsecs 1 (vi) and 2(1).
- ¹³⁴ Should enrichment come into question, it will almost always be a situation involving more than two parties. But this will not invariably be so because, for example, the drawer and the payee could be the same person: Tager (n 128) para 10.
- ¹³⁵ Or 'drawee' i.e. 'the person to whom the drawer addresses the order.' Tager (n 128) paras 6 and 10.
- ¹³⁶ Or 'drawer' i.e. the 'party who gives the order and who signs the bill': Tager (n 128) para 10. His signature is a prerequisite for the validity of the cheque; 'without it there is no bill.': Tager (n 128) para 6.
- ¹³⁷ In other words, the person to whom the drawer originally made out the cheque; in other words, 'the first holder of the instrument': Tager (n 128) para 6n7.
- ¹³⁸ Where this possessor is a 'holder in due course' i.e. certain requirements have been satisfied, including possession and that the document has been negotiated to him, that he takes the instrument in good faith and for value (i.e. *ex causa onerosa*) – but note that '[e]very holder of an instrument is prima facie deemed to be a holder in due course': Tager (n 128) paras 3, 9 and 78.
- ¹⁴⁰ This is made possible by the concept of negotiability i.e. transfer in terms of s 29 (1) of the Bills of Exchange Act 34 of 1964. Or it could be ceded: Tager (n 128) para 2.

PAYMENTS BY CHEQUE AND ANALOGOUS TRANSACTIONS

1 All the legal transactions are valid



There can obviously be no question of an enrichment claim in circumstances where all of the legal transactions are valid,¹⁴¹ as any shift of wealth will be made *cum causa*, but it might be useful to consider this situation first, so that the context is clear before we examine the complications which arise when enrichment liability enters the picture.

German law: the relationships between the parties

In German law, the relationships between the parties are generally given special labels, which are useful in extrapolating principles developed in this context. Thus the relationship between the instructing party (B) and the recipient of the 'performance' (C) is called the *Valutaverhältnis* (the 'value relationship'), and the relationship between the instructing party (B) and the instructed party (A) is generally called the *Deckungsverhältnis* (the 'cover relationship').¹⁴² Broadly speaking, we can say that the relationship between B and C involves a *shift of assets* to C for B, and the relationship between A and B explains *why A* (rather than B) should be responsible for bringing about that shift.

¹⁴¹ Except, arguably, in the case of overpayment, but then there would be no valid contract envisaging transfer of the excess.

¹⁴² See, for example, Medicus *Bürgerliches Recht* marg note 674; Loewenheim *Bereicherungsrecht* 32; Wieling *Bereicherungsrecht* 80.

The relationship between B and C

Generally speaking, in this context at least, it is unimportant what particular type of contract or other legal relationship constitutes the *Valutaverhältnis*. It could thus either be a legal duty which arises *ex lege*,¹⁴³ or any contract which envisages performance by B to C.¹⁴⁴ This contract could, for example, be a sale or lease, an interest-bearing loan or an interest-earning deposit. The identity of a contract between B and C will generally not affect the enrichment rules that come into play where one of the legal relationships between A, B and C is defective. The important exception to this general rule is the contract of donation, because the law of enrichment applies special rules to cases of gratuitous performances.¹⁴⁵

What is the effect of the ‘performance’ A–C on the relationship between B and C? As explained above,¹⁴⁶ A’s ‘performance’ to C will be regarded as a performance by B to C,¹⁴⁷ and it will therefore extinguish B’s duty¹⁴⁸ to perform to C. Fictionally, therefore B *himself* performs – it is thus not a case of third party performance, as discussed in Chapter Two. For example, let us imagine that Brigitte buys a watercolour from an art dealer, Cecilia, for €100. Cecilia hands the painting to Brigitte, who puts it in her bag and gives Cecilia a cash cheque for €100, drawn on her bank, A-Kasse. Cecilia banks the cheque at the local branch of A-Kasse, and the cashier hands her €100 in cash. A-Kasse’s ‘payment’ to Cecilia will simultaneously constitute Brigitte’s performance to Cecilia and extinguish Brigitte’s duty to pay Cecilia.¹⁴⁹

The relationship between A and B

The more significant legal relationship for our purposes is the one between A and B. It is, after all, this relationship that is used to identify a case as falling into the *Anweisung*-

¹⁴³ For example, a statutory duty of support.

¹⁴⁴ And, generally, counter-performance by C to B.

¹⁴⁵ In such cases § 822 BGB would apply. See Chapter One at p 22 above.

¹⁴⁶ At p 167.

¹⁴⁷ As well as a performance by A to B: see the next section below.

¹⁴⁸ Assuming that such a duty exists i.e. there is a promise of donation or another contract requiring A to perform to B, or B owes a performance to C in terms of some sort of extra-contractual obligation.

¹⁴⁹ And its own duty vis-à-vis Brigitte – see p 185 below.

category.¹⁵⁰ While all German writers appear to agree that the relationship between B and C is the *Valutaverhältnis*, it is not quite as clear what is denoted by the word 'Deckungsverhältnis'.

The problem is that, as will be recalled from the discussion above,¹⁵¹ the link between A and B usually has two 'components': the *Anweisung* and the underlying contract between A and B. For example, where a client issues an instruction to his bank by means of a cheque, there are two legally significant 'transactions'¹⁵² between the client and his bank: first, the underlying banker-client contract, which, in German law, is a type of non-gratuitous mandate,¹⁵³ and then the instruction itself, which is the *Anweisung*.¹⁵⁴ They are linked in that the cheque embodies an instruction to the bank to fulfil an obligation arising from its underlying contract with its client, by paying the client's creditor. But it will be recalled that, in German law, the validity of one does not depend on the validity of the other. In other words, it is possible to conceive of a situation where there is a valid *Anweisung* in the absence of a valid underlying contract,¹⁵⁵ and vice versa. Which of the two 'transactions' is regarded as the *Deckungsverhältnis*, or does the word refer to the composite relationship between A and B?

Some writers seem to allude to the *Anweisung* itself as the *Deckungsverhältnis*,

¹⁵⁰ See Chapter One at p 56.

¹⁵¹ For example, at 165.

¹⁵² One bilateral (the underlying contract) and one unilateral (the *Anweisung*).

¹⁵³ This contract is similar to mandate but is distinguished from it by the payment of fees, the contract of mandate being gratuitous by definition, as was explained above.

¹⁵⁴ In a way, therefore, these are the most complicated of the three-cornered enrichment situations in that they involve not three, but at least (e.g. another would be an agreement between the drawer of the cheque and the payee, embodied in the handing over of the cheque, that the cheque would constitute a conditional payment i.e. conditional upon being honoured by the bank – see D V Cowen 'A bank's right to recover payments made by mistake: *Price versus Neal* revisited' (1983) 16 *CILSA* 1) four legal 'transactions': to use banking terminology, there would be the contract between the drawer B and the payee C (i.e. the *Valutaverhältnis*), the underlying contract between the bank A and its client B (the banker-client contract), B's specific instruction to A in the form of a cheque, and the handing over of the relevant amount by A to C.

¹⁵⁵ See, e.g., RGZ 60, 24. Such cases seem improbable in a banking context, although one can conceive of circumstances where a cheque would be written by a person who was no longer in a banker-client relationship to a bank; for example, B's bank could have closed his account while he was still in possession of a cheque book.

while others use the term to refer to the underlying contract.¹⁵⁶ Yet others seem to use the term to denote the overall legal relationship between A and B. When a particular writer refers to a ‘defective *Deckungsverhältnis*’, it is therefore not always immediately obvious whether he means that there is a defective *Anweisung*, a defective underlying contract,¹⁵⁷ or that there is a defect in either and it does not matter which.¹⁵⁸ In order to avoid this sort of confusion,¹⁵⁹ I will avoid using the term in this chapter, and will specify whether I am referring to the *Anweisung* or the underlying contract.

Again, it should be borne in mind that any ‘performance’ made by A to C in terms of an *Anweisung* by B to A will be regarded as performance in terms of the relationship between A and B.¹⁶⁰ In other words, if A has a duty to perform to B, and B tells him rather to direct this performance to C, and A does so, A’s action will extinguish his duty to perform to B. Thus, to embroider on the example mentioned above, assume that Brigitte has previously deposited money in her account held at A-Kasse Bank. In terms of their banker-client contract, A-Kasse has a duty to honour Brigitte’s cheques, provided that she has sufficient funds in her account or an adequate overdraft facility. When Brigitte instructs A-Kasse, by means of a cheque, to pay €100 to Cecilia, and A-Kasse does so, A-Kasse’s payment will constitute performance of its own duty vis-à-vis

¹⁵⁶ See, for example, the ambiguity of this sentence taken from Koppensteiner and Kramer *Bereicherung* at 31 (my translation): ‘the *Deckungsverhältnis* ... is ... defective in that the defect does not lie in the causal *Deckungsverhältnis* (the loan is valid) but in the absence of an attributable *Anweisung*.’ Also see 32 regarding their discussion of Pfister’s views.

¹⁵⁷ See, e.g., *Jauernig/Schlechtriem* § 812 marg note 35: ‘Auch bei Mängeln des *Deckungsverhältnisses* oder *Valutaverhältnisses* Fehlt jedoch eine *Weisung*....’ (my emphasis). Also see Loewenheim *Bereicherungsrecht* (at 35), where he draws a distinction between cases where there is a defective underlying relationship and those where there is a defective *Anweisung* relationship. He seems to use the word *Deckungsverhältnis* to refer to the underlying relationship and not to the *Anweisung*. (i.e. the *Deckungsverhältnis* and the *Valutaverhältnis* are the causal relationships (see 32).

¹⁵⁸ In other words, that there is a defect somewhere in the overall relationship between these two parties. See, e.g., Koppensteiner and Kramer *Bereicherung*, who distinguish conceptually between situations where there is a defective underlying relationship between A and B and where this relationship is valid but the *Anweisung* B–A is defective. They seem to use the term *Deckungsverhältnis* to refer to the overall relationship between A and B and not consistently for the underlying relationship on its own – see, e.g., p 24. Cf 31: ‘[D]as *Deckungsverhältnis* D–S [i.e. A–B] ... [ist] fehlerhaft, wobei der Fehler allerdings nicht im kausalen *Deckungsverhältnis* liegt (der Darlehensvertrag D–S [i.e. A–B] ist gültig vereinbart worden), sondern im Fehlen einer zurechenbaren *Anweisung* überhaupt.’

¹⁵⁹ Which is symptomatic of differences of opinion as to which relationship constitutes the *causa* in such cases: see p 266 ff below.

¹⁶⁰ As well as ‘performance’ by B to C: see above.

relationship between B and C as being significant only where it is gratuitous. In other words, provided that the relationship between B and C is valid, the only important question for our purposes is whether B intends to make a gratuitous performance to C.

Assuming that B does owe a debt to C, and he hands C a cheque in settlement of this debt, B and C thereby conclude a conditional 'debt-extinguishing agreement'. This agreement is dependent upon the bank's honouring the cheque. When the cheque is honoured by the bank, payment is regarded as having taken place by B to C (and the debt B–C as having been discharged) upon the date of delivery of the cheque (not the date on which the cheque is honoured). In other words, the bank's payment of the cheque fulfils the condition, payment becomes final, and the underlying debt owed by B to C is extinguished.¹⁶⁵

The relationship between A and B

South African law focuses more attention on the cheque as a form of negotiable instrument¹⁶⁶ than on the relationship between the drawer and drawee. While there seems to be agreement that a distinction should be drawn between the underlying banker-client contract and the cheque itself, the nature and content of these two juristic acts seem uncertain.

As said above, there has been some dispute as to the legal nature of the banker-client contract. It has, for example, been characterised as a form of mandate.¹⁶⁷ Stassen, for instance, goes to great lengths to show that it is a special kind of mandate coupled with *mutuum*,¹⁶⁸ De Wet suggests that when a bank pays a cheque it does so as its

¹⁶⁵ This will be discussed in further detail below at p 216 ff.

¹⁶⁶ In other words a document (a 'waarde papier', from the German 'Wertpapier' i.e. 'paper which has an inherent value that derives from the rights which it embodies; paper which in itself constitutes property.': Tager (n 128) para 2) which 'is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore': *Crouch v Credit Foncier of England* (1873) LR 8 QB 374 at 381, quoted by Tager (n 128) para 2; *Hill v The Colonial Banking & Trust Co* 1927 TPD 138 at 148.

¹⁶⁷ See Malan and Pretorius *Bills of Exchange* 203; Tager (n 128) para 154; *Stapelberg NO v Barclays Bank DC&O* 1963 (3) SA 120 (T); and see J T Pretorius 'Aspects of the collection of a cheque cleared through an automated clearing bureau' (1998) 10 *SA Mercantile LJ* 326 at 332 and 334 regarding the contract of mandate between the payee and his collecting bank.

¹⁶⁸ Stassen 1980 *Modern Business Law* 77 at 79 ff.

client's agent.¹⁶⁹ Cowen, on the other hand, argues that it is a contract *sui generis*.¹⁷⁰ In my opinion, Cowen's view is correct: the contract between a bank and its client is a special kind of contract, which cannot fit into the traditional scheme of specific contracts without distortion of the *essentialia* of the category of contracts in question.¹⁷¹

This lack of certainty also extends to the juristic nature of the cheque itself. It seems that the instruction embodied in the cheque, if discussed at all, is regarded as a mandate.¹⁷² This is unsatisfactory for various reasons relating to the contractual nature of mandate. For example, if one accepts that a cheque is a mandate, and therefore a contract in its own right, the *naturalia* of mandate and the general principles of the law of contract become applicable. This opens the door, for example, to the argument that a cheque is voidable on the basis of misrepresentation. In other words, it is able to be upheld or set aside with retrospective effect by the aggrieved party. If one imagines that

¹⁶⁹ Cf the comments of Moseneke AJ in *Standard Bank of SA Ltd v ABSA Bank Ltd and Another* 1995 (2) SA 740 (T) at 746G-H: 'To typify the relationship between a bank and its customer as one of agency is to simplify and perhaps to trivialise an inherently and conspicuously complex collection of juristic relationships which exist between a banker and its customer.'

¹⁷⁰ Cowen and Gering (n 127) 368. Also see *Standard Bank of SA Ltd v ABSA Bank Ltd and Another supra* at 747A-D, where the learned judge points out that 'the proper course to take is not to apply a rigid and pre-existing characterisation of the customer-banker legal relationship, but to examine the specific legal *nexus* which exists between a particular banker and its customer. Indeed, some such relationships would have strong features of a principal and an agent; sometimes characteristics of a loan for consumption; and indeed sometimes such relationship is ... one between a debtor and a creditor and very often the relationship would be a collection of features of each of these legal institutions I have referred to.'

¹⁷¹ Stassen 1980 *Modern Business Law* 77 sets himself the task of categorising the contract in terms of the traditional scheme of specific contracts. There are various reasons why its characterisation as a mandate does not make sense. For example, it may happen that someone opens a bank account, makes a deposit, and then does not issue any instructions to the bank before closing the account: in such a case, it would be ludicrous to label the contractual relationship between the parties a 'mandate'. If we were to force the banker-client contract into the mould of any of the classic specific contracts, deposit would perhaps be a better choice, although this would also lead to mental contortions in situations where a client has made no deposit, but merely taken out a loan.

¹⁷² See, e.g., Stassen 1980 *Modern Business Law* 77 at 80 (who regards the underlying contract as a combination of mandate and *mutuum* and the cheque itself as a 'besondere mandaat waardeur die verpligtinge uit die algemene mandaat vir 'n besondere geval gekonkritiseer word'). Regarding other forms of payment, such as debit order, credit card, credit transfer and EFTS, see, for example, Malan and Pretorius *Bills of Exchange* para 202 at 333: 'In none of these instances does the bank effecting the payment act as the representative of the debtor: it functions as a mere mandatary.' On the preceding page, the authors say that although these forms of payment are different from cheques, the 'legal relations do not necessarily differ', thus implying that the bank also acts as a mandatary in paying a cheque. Later, when discussing the underlying contract (para 203 at 337), they mention almost in passing that cheques are 'dependent' orders, because their consequences are in many respects governed by the terms of this embracing relationship.'

someone forges a signature on a cheque, and uses such cheque to pay C, who is the aggrieved party? Could the aggrieved party elect to ignore the fraud (as he would be entitled to do in terms of the general principles of contract) and uphold the contract/cheque anyway? Just one other example which might illustrate the unsatisfactory (and somewhat ludicrous) logical consequences of classifying a cheque as a contract relates to the 'basis' of contractual liability. Contracts are said to be based on consensus or the reasonable reliance by one party on the appearance of consensus. When would the bank and its client reach consensus? It could surely not be argued that the client, when writing a cheque, reasonably believes that a contract between himself and his bank comes into being. This is also borne out by the fact that a cheque, unlike other bills of exchange, does not require acceptance by the drawee.

Analysing the various relationships in terms of the *delegatio solvendi*, as suggested above, allows a way out of these difficulties. It provides insight into the various legal relationships without distorting the accepted legal principles relating to cheques. For example, banks have certain duties relating to their customer's cheques (e.g., a bank has a legal 'duty to honour its customer's cheques when the account is in credit or provision has been made for an overdraft').¹⁷³ By using the analysis suggested above, it becomes clear that the cheque is not a contract of mandate but merely an instruction by a client to his bank that the bank perform in terms of the underlying banker-client contract in a particular way viz by paying a third party.¹⁷⁴ Payment of a cheque is thus merely the bank's performance of one of its obligations in terms of the banker-client contract.

The relationship between the cheque and the underlying banker-client contract is also generally not discussed but it seems more likely that the principle of abstraction would generally not apply;¹⁷⁵ in other words, if a client drew a cheque on his bank in

¹⁷³ Pretorius (1998) 10 *SA Mercantile LJ* 326 at 332-3; Cowen and Gering (n 127) 368.

¹⁷⁴ This appears to lie behind the thinking of Malan and Pretorius *Bills of Exchange* para 203 at 337, particularly since they refer to German authority for their notion of 'dependent orders'.

¹⁷⁵ E.g. in view of the fact that South African law does not recognise that cheques can be 'valid on the face of it'. Also see Malan and Pretorius *Bills of Exchange* para 203 at 337: '“dependent” orders’ (my emphasis).

circumstances where the underlying banker-client contract was void, it is likely that the cheque would also be void.¹⁷⁶ On the other hand, it has been stated that if a bank purports to terminate its contract with its client but does not give notice as required, its duty to honour its client's cheques will continue.¹⁷⁷ It seems, therefore, that in certain exceptional circumstances, an instruction to a bank in the form of a cheque would still be effective even though the underlying contract was no longer in existence.

When is a cheque regarded as having been 'paid', in terms of the relationship between the drawer and his bank?¹⁷⁸ If C cashes a cheque at a bank, delivery of the cash would be the moment of payment. If, however, C deposits the cheque in his bank account, the moment of payment of the cheque depends whether C's collecting bank is a branch of A bank (i.e. the drawee bank) or a different bank. If C's collecting bank is a branch of A bank, payment of the cheque takes effect when the drawee bank makes the decision to honour the cheque.¹⁷⁹ If, on the other hand, C's collecting bank is not a branch of the drawee bank (i.e. it is a completely separate legal entity, necessitating clearance through the automated clearing bureau),¹⁸⁰ then payment takes place 'when the period provided for in the inter-bank agreement expires without the drawee bank having given notice of the dishonour of the cheque',¹⁸¹ except 'where the decision to honour the cheque is communicated to the collecting bank.'¹⁸²

¹⁷⁶ For example, if the underlying contract was void because the would-be client lacked contractual capacity on the grounds of insanity, any cheques that he drew would arguably also be void, even if he drew them during a lucid interval.

¹⁷⁷ Malan and Pretorius *Bills of Exchange* para 214.

¹⁷⁸ See p 187 above regarding payment in terms of the relationship between B and C.

¹⁷⁹ *Rosen v Barclays National Bank* 1984 (3) SA 974 (W). For criticism of this decision see, e.g., Coenraad Visser 'The automated clearing of cheques: when is payment effected?' (1991) 21 *Businessman's Law* 3 at 4-5; M Greeff and C J Nagel 'Die tydstop van betaling en die sertifisering van tjeks' (1992) 25 *De Jure* 56 at 60; Pretorius (1998) 10 *SA Mercantile LJ* 326 at 327-8. The most convincing reason why this decision is unsatisfactory is, in my view, the difficulties of proof that it causes; as Visser points out (*op cit* at p 5), even in this case, the court could not decide when the decision to pay had been made, and had to refer the case back for the hearing of oral evidence in this regard.

¹⁸⁰ On the functioning of this bureau, see e.g. the articles mentioned in the previous footnote, particularly Pretorius (1998) 10 *SA Mercantile LJ* 326 at 327 (where a very clear account of the procedure is given); *Rosen's case supra* at 975-7 and *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander* 1991 (3) SA 605 (A) at 609C-G.

¹⁸¹ Pretorius (1998) 10 *SA Mercantile LJ* 326 at 329 and 330; *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander supra*. Also see the other articles in note 179 for discussion of this case.

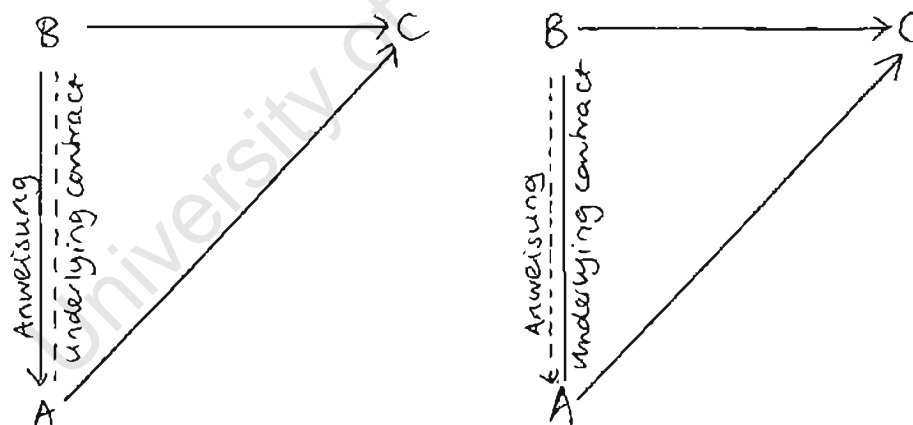
¹⁸² Pretorius (1998) 10 *SA Mercantile LJ* 326 at 329; Greeff and Nagel (1992) 25 *De Jure* 56 at 60-

The relationship between A and C

As in German law, there would typically be no contractual or other obligation between A (the drawee) and C (the payee). If A honours B's cheque to C by handing cash to C, ownership of the money will pass from A to C by *commixtio*.¹⁸³ If, on the other hand, C deposits the cheque in an account held at a collecting bank, C would receive the money via book entries.

Is the payment A–C regarded as a payment by the bank (directly to C) in its own right, or is this regarded as a performance of the bank's obligation to its client, and a simultaneous performance of the client to the payee? The question of the effect of the transfer A–C on the other two relationships (i.e. whether it constitutes two performances,¹⁸⁴ as in German law or only one performance A–C) has led to controversy and will be discussed in detail below.

2 While the relationship between B and C is valid, there is a defect in B's relationship with A



This section deals with situations where B owes a performance to C (i.e. there is a valid legal relationship between them), A makes a corresponding performance to C, but,

61.

¹⁸³ See C G van der Merwe *Sakereg* 2 ed (1989) at 263 ff. Also see *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 967H–J for an example of the application of this principle in the context of payments by a bank in terms of a cheque.

¹⁸⁴ A–B and B–C

unknownst to A,¹⁸⁵ the relationship between A and B is defective. For example, B validly owes R5 000 to his landlord C, B writes a cheque instructing his bank (A) to pay C R5 000, and A honours the cheque. It transpires, however, that the cheque was invalid; for example, due to non-compliance with the formal requirements for validity (e.g. B forgot to sign the cheque). In other words, in what follows, it will be assumed that A performed to C in circumstances where there is no problem with the relationship between B and C. The focus thus falls on the relationship between A and B.

A myriad of faults could bedevil the relationship between A and B. These could relate to the underlying relationship,¹⁸⁶ to the *Anweisung* itself, or to both.¹⁸⁷ As in other situations where there are 'parallel' legal transactions,¹⁸⁸ a question naturally arises as to the interrelationship between these transactions. In other words, can there be a valid *Anweisung* in the absence of a valid underlying relationship? Or is the validity of one dependent on the validity of the other?

Difficulties in categorising such cases

As mentioned above, German law applies the separation principle and the abstraction principle to such cases.¹⁸⁹ In other words, the validity of the *Anweisung* and the validity of the underlying relationship are regarded as being independent of each other. As a matter of logic, therefore, cases where there is a legal defect in the relationship/s between A and B could be divided into the following categories: (a) situations where there is neither a valid underlying relationship nor a valid *Anweisung*; (b) situations where there is a valid underlying relationship but this particular *Anweisung* is defective or absent; and (c) situations where there is a valid *Anweisung* in the absence of a valid underlying relationship.

While categories (a) and (b) seem unproblematic, at first it is difficult to conceive

¹⁸⁵ Otherwise, in terms of German law, § 814 BGB would apply: see Appendix A.

¹⁸⁶ For example, a contract such as a banker-client contract, or an insurance contract.

¹⁸⁷ Or both e.g. someone lacking in capacity purports to open a bank account and then write a cheque.

¹⁸⁸ For example, the transfer of ownership/contract of sale; cession/contract to cede.

¹⁸⁹ See p 165 above.

of practical situations where an *Anweisung* could be valid even if the underlying contract is void. For instance, it seems strange to imagine that a cheque could be valid, even if there were no valid underlying banker-client contract. The effectiveness of the cheque as a legal instrument seems to be derived¹⁹⁰ from the underlying contract. This idea appears even more bothersome when we consider other instances of *delegatio solvendi*: how can someone validly delegate the performance of an obligation to a third party with whom he has no valid legal relationship? Thus, for example, how can a negligent driver validly instruct an insurer (with whom he has no valid policy) to pay damages to a person injured by the driver?

Upon reflection, however, is this any stranger than allowing a valid transfer of ownership in the absence of a valid underlying obligatory agreement? Or does it demand a greater suspension of disbelief than the acceptance that a claim may validly be ceded by one party to another in circumstances where they have not concluded a valid obligatory agreement to cede the claim?

It should also be borne in mind that, as said above, according to German law, an *Anweisung* does not itself create any *obligation* to perform. If B instructs A to perform to C, A is under no legal obligation to do so, and C has no right to claim such performance from A. A is merely authorised (by B) to ‘perform’ to C, just as C is authorised to accept the performance as coming from B. The validity of the *Anweisung* is therefore slightly different in nature to the validity of an obligation. Whereas a valid obligation creates a duty to perform and a right to claim that performance (and hence a *causa* for the performance), a valid *Anweisung* merely has the effect of allowing a debtor to extinguish his obligation to his creditor by performing to someone other than the original creditor. It thus has the effect of ‘deflecting’ the effects of the performance so that they do not operate between A and C directly, but via B (i.e. A–B–C).

This appears more clearly from a comparison between an *Anweisung* (or *delegatio solvendi*) and a cession. If A owes a performance to B, and B *cedes* the claim

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At least partly; validity is also derived from the appropriate legislation.

to that performance to C, C will acquire the right to claim the performance from A, and A will have the duty to perform to C. If A accordingly performs to C, his performance will not have been made *sine causa* (assuming that all the transactions involved are valid), and the relevant *causa* will lie between A and C. If, on the other hand, A owes a performance to B, and B *instructs* A to perform to C, A has no duty to do so, and C cannot enforce this performance.¹⁹¹ If, however, A nevertheless performs to C, his performance will also have been made *cum causa*, but the *causa* does not lie in the 'relationship' between A and C, as no obligations exist between them.¹⁹² In such circumstances, the obligations which provide the *causae* for A's performance – which is regarded as a performance A–B and a performance B–C – lie in the relationships between A and B (i.e. the 'underlying relationship'), on the one hand, and B and C on the other. This is the result of the fiction that arises upon performance that the performance in question was made by A to B and B to C, allowing the extinction of both obligations and distinguishing this situation from performance of the obligation of another.¹⁹³ To decide, therefore, that there can be a valid *Anweisung* where there is no valid underlying relationship (i.e. that the abstraction principle applies) seems to have little practical consequence outside the law of enrichment. It should also be borne in mind that there might be requirements for the validity of a particular kind of *Anweisung* that constitute exceptions to the general principle that the validity of the *Anweisung* and that of the underlying relationship are to be determined independently of one another.

The first possible objection to the theoretical categorisation mentioned above therefore seems more apparent than real. The second problem is a more practical one. While there are many examples of cases where there is some defect in the legal relationship/s between A and B, it is not always easy to slot them into one of the three categories mentioned above.¹⁹⁴ It should be borne in mind that the purpose of categorising cases at all is to ensure that like cases are treated alike. Categorisation for

¹⁹¹ Unless it has been accepted i.e. the so-called *angenommene Anweisung*.

¹⁹² But cf. von Caemmerer's view and Pfister's criticism thereof: see below at p. 216.

¹⁹³ In that, in this case, A is performing in terms of his own obligation to B, whereas in the case where A performs the obligation of another – as discussed in the previous chapter – he is not regarded as performing in terms of his own obligation.

¹⁹⁴ And to distinguish them from the other situations dealt with in this chapter e.g. *Doppelmangel*.

its own sake is a fruitless exercise. The underlying question here is whether cases where an *Anweisung* is defective or absent should be treated in the same way as cases where the underlying relationship between A and B is defective or absent.

An example of a situation falling into category (a) (i.e. where both the underlying relationship and the *Anweisung* are defective or absent) would be: B was insane or otherwise lacking in legal capacity to act, both when he opened a bank account and also when he instructed his bank to pay a sum of money to C.¹⁹⁵

More common are cases resorting under category (b) (i.e. situations where there is a valid underlying relationship but the particular *Anweisung* in question is defective or absent).¹⁹⁶ For example, by writing a cheque, B purports to instruct his bank, A, to make a payment owed to C, but although there is a valid underlying contract between A and B (viz a banker-client contract), this specific instruction is defective. The defect could relate to the capacity or authority of the drawer (B). For instance, while he had legal capacity to act when he opened his account with A, B could have been insane¹⁹⁷ or otherwise lacking in capacity when he wrote the cheque. Alternatively, the defect could be a formal one: for instance the cheque might bear the rubber stamp of the drawer company (B), rather than the appropriate signature/s.¹⁹⁸ One could also cite the example mentioned above (viz the drawer forgets to sign the cheque), or any of the other situations where a cheque might be invalid due to non-compliance with the formal requirements for validity. Alternatively, the reason for invalidity could relate to the state of mind of the drawer e.g. where he signed a cheque under duress.

These are all cases where the cheque, or other *Anweisung*, is legally void i.e. B instructs A to make a performance owed by B to C but, as a matter of law, there is no *Anweisung*. There could also conceivably be situations where there is no *Anweisung* as a

¹⁹⁵ E.g. a mature-looking unemancipated minor: see Koppensteiner and Kramer *Bereicherung* 31.

¹⁹⁶ For a list of German examples, see Koppensteiner and Kramer *Bereicherung* 31.

¹⁹⁷ See, e.g., BGHZ 111, 382; Loewenheim *Bereicherungsrecht* 35-6; *The Standard Bank of South Africa Ltd v Haskins supra*.

¹⁹⁸ BGHZ 66, 362. Also see Loewenheim *Bereicherungsrecht* 35-7.

matter of fact. Thus, A might not have received any instruction at all.¹⁹⁹

A further sub-category is required to accommodate situations where B validly instructs A to pay C, but withdraws this instruction prior to payment. For example, B writes a cheque in favour of his creditor, C, instructing bank A to pay C R1 000. B then countermands, or stops, the cheque i.e. he revokes his original instruction to A. C nevertheless deposits the cheque in his account at bank D, D presents the cheque to A, and A pays the amount notwithstanding the countermand.

One can also imagine cases where B instructs his bank A to pay a creditor, but A does not obey the instruction to the letter. Thus a bank might transfer too much,²⁰⁰ such as where it transfers the same amount twice.²⁰¹ For example, B draws a cheque on his bank A in favour of his landlord C, instructing the bank to pay C R2 500. The bank pays C R25 000. Or the bank transfers R2 500 twice. The categorisation of such cases depends on whether B owed the excess to C anyway (e.g. as arrear rental). If this excess was not owed to C, the case should arguably be regarded as one of so-called *Doppelmangel* ('double fault'): regarding the excess, there was no valid instruction, and it was not owed to C. If, on the other hand, the amount paid in excess was nevertheless owed by B to C, it could arguably be dealt with as one of the cases presently under consideration.

Finally, we come to category (c) viz situations where there is a valid *Anweisung* in the absence of a valid underlying relationship. An example of such an instance recognised in South African law is where B writes a cheque instructing bank A to pay B's creditor C in circumstances where the underlying banker-client contract has been terminated.

The examples cited in the previous paragraphs are relatively unproblematic, as

¹⁹⁹ Whether actual or imputed by law e.g. in terms of the *Rechtscheinhaftungsprinzipien* (i.e. rules on protection of reliance): see Koppensteiner and Kramer *Bereicherung* 31.

²⁰⁰ See, for example, *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A); BGH JZ 1987, 199 at 200 ff; BGH NJW 1987 185 at 186.

²⁰¹ OLG Hamburg NJW 1983, 1499; OLG Munchen NJW-RR 1988, 1391; KG NJW 1992, 816.

far as classification is concerned. The real difficulties arise when one tries to categorise cases where a fourth party is involved, such as where a bank honours a forged or stolen cheque, or transfers the correct amount to the wrong recipient.²⁰² Imagine that the cheque in each of the following situations is drawn on Bank A, and that Bank A makes a payment:

- 1 D steals a blank cheque from E, completes the cheque (drawn on A) in favour of his creditor F, and forges E's signature on the cheque.²⁰³
- 2 G makes out a cheque in favour of H, J steals the cheque and forges an endorsement to his creditor K.²⁰⁴
- 3 L signs a blank cheque, which is subsequently stolen by M, who completes the cheque in favour of his creditor N.
- 4 P fills out and signs a cheque purporting to pay Q R6 000. R steals the cheque, changes the amount to R60 000 and uses it to pay his own debt to Q.
- 5 S makes out a cheque in favour of T, the cheque is stolen and deposited in the account of U, and A mistakenly pays U via his collecting bank.
- 6 V makes out a cheque in favour of his creditor W, a third party (X) comes into possession of the cheque and uses it to pay Y's debt to W.

Some of these problems arise due to the nature of the cheque as a portable 'commercial paper'. There is always the danger that a cheque may come into the wrong hands, either before or after completion thereof. This risk is increased by the fact that the cheque is not given directly to the drawee bank, as happens with transfer orders (*Überweisungen*), or transfer instructions effected electronically via the internet or an

²⁰² Assuming that there was a valid *Valutaverhältnis* between the instructing party and the incorrect recipient, otherwise it would be a case of *Doppelmangel*, to be treated as discussed at p 312 ff below. BGHZ 66, 372 (375) = NJW 1976, 1449.

²⁰³ See, e.g., *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (A) and *First National Bank of Southern Africa Ltd v East Coast Design CC and Others* 2000 (4) SA 137 (D). Cf *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A), where a company cheque was signed by the employees who were entitled to do so, but it was used to settle the private debt of one of the employees, without the company's knowledge. In this regard, also see Honoré 1958 *Acta Juridica* 135.

²⁰⁴ Or, as in *King v Cohen Benjamin & Co* 1953 (4) SA 641 (W), G makes out a cheque in favour of H and gives it to K to deliver to H. K persuades H to endorse the cheque to him. See the judge's summary of the facts of this case at 648A-E of the judgment.

automatic teller machine. (In such cases, B directly instructs A to pay C, whereas the instruction in the form of the cheque is usually handed or sent to the payee, who usually deposits it in his own bank account, and the collecting bank presents the cheque to the drawee bank via the automated clearing bureau.)

The risks of deception are not confined to cheques, however. When B buys something from a vendor C, and hands over his credit card to effect payment, the vendor swipes the card through a machine which conveys an electronic instruction to B's bank. B confirms this instruction by signing a credit card slip. Although the line of communication between the client and his bank is arguably more direct than that involved with payments by cheque, the portability of the credit card and the information contained on it²⁰⁵ presents hazards of a different kind. For example, if B lets the card out of his sight, C's employee has a chance to switch cards, or to copy the card number and the date of expiry of the card (which is often all the information needed to make a transaction over the telephone, for example.)

Assuming that the bank in each of these cases is A, who are the parties at the other two points of the triangle (i.e. B and C)? Which is the *Valutaverhältnis*? Is there a triangular relationship at all? Is B always the party who makes the instruction (whether as client or thief), or is B the holder of the bank account which is debited consequent to the payment in accordance with the instruction, or is B always the payee's debtor? Is C the actual recipient of the money, or is C the recipient originally intended by the account-holder? Unless it is clear which party is which, it is impossible to decide whether there is a valid underlying relationship between A and B, or a valid obligation owed by B to C.

If it is assumed that A's contract-partner (i.e. where A is a bank, one of its customers) is B, then cases 1 to 5 all concern situations where there is a valid underlying

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The lack of sufficient legal safeguards is also a problem e.g. in practice, the only inspection of the signature on the card and that on the slip is made by the vendor or its employee; the ease of paying over the telephone or internet using the card number and expiry date; the possibility of so-called 'manual overrides'; etc. Cf, e.g., the facts of *Living Legend Motors (Pty) Ltd v De Villiers and Others* (W) Case No 20279/2001 15 March 2002, unreported.

contract but no valid *Anweisung* to pay the recipient in each case.²⁰⁶ In other words, those cases would fall into the second of the three categories mentioned at the outset. If, on the other hand, the underlying relationship must lie between A and the party who actually instructs A (i.e. if one identifies the instructing party as 'B') to pay the recipient, the picture looks different. In cases 1, 3 (and possibly 2, if one regards the endorsement as an instruction), there is no valid underlying relationship and, it would appear, no valid cheque (due to the fraudulent completion or alteration of the cheques); in case 4 there is a valid underlying relationship but no valid instruction to pay this amount to the recipient; in case 5 there is a valid underlying relationship but no valid instruction to pay this recipient; in case 6 there is both a valid underlying contract between the instructing and instructed parties, and a valid instruction to pay this recipient (W). In other words, cases 1 to 3 would fall into category (a); cases 4 and 5 would fall into category (b); and case 6 should not be discussed in this section at all (as there is no defect in the relationship/s between A and B [V]).

German lawyers seem to follow the first approach mentioned in the previous paragraph. In other words, they regard the account-holder as 'B',²⁰⁷ and the *Deckungsverhältnis* as thus lying between A and B. The recipient is whoever has 'received something' (*etwas erlangt*).²⁰⁸ Most writers seem to take a pragmatic rather than an exhaustive approach. They typically divide their discussion into three categories: cases where there was no valid underlying relationship between A and B; those where there was initially a valid *Anweisung* but it was subsequently withdrawn; and those where there was never a valid *Anweisung*. Although cases which fall into the first category are rare, this category was the focus of much of the early discussion of three-cornered situations, and it was in this context that the *Leistungsbegriff* was developed.²⁰⁹ The other two categories, which correspond to the most common factual

²⁰⁶ Thus, in case 1, there was no valid instruction to pay F; in case 2, there was no valid instruction to pay K; in case 3, there was no valid instruction to pay N; in case 4, there was no valid instruction to pay Q (at least regarding the excess); and in case 5, there was no valid instruction to pay U.

²⁰⁷ Who would usually also be the instructing party, but not in cases of stolen and forged cheques.

²⁰⁸ In terms of § 812 BGB; see introductory chapter above at p 22.

²⁰⁹ *Münchener Kommentar/Lieb* § 812 marg note 45: these were the cases that dominated discussion, and it was in this context that the *Leistungsbegriff* was developed.

situations arising in practice, are accordingly seen against the background of this earlier discussion. In order to give an accurate picture of the German law and to be able to make meaningful comparisons,²¹⁰ I will follow this categorisation. In other words, when I refer to B, I am referring to the bank's actual or purported client.

(a) Situations where there is no valid underlying relationship between A and B

Here we are concerned with cases where 'B' instructs A to pay his creditor C, in circumstances where A and 'B' are not linked by any underlying 'covering' obligation.²¹¹

German law

The classic German case falling into this category is the case of the fraudulent postal employee.²¹² He ('B')²¹³ fraudulently instructed the post office, A, (via postal orders which he processed himself) to pay a debt which he owed to his bank C. He neither had an account with the post office nor had he made a deposit to cover the postal orders.²¹⁴ In other words, as the post office did not have any contract with him,²¹⁵ there was no valid underlying causal relationship for the transaction. The court held that the post

²¹⁰ In other words, to 'compare apples with apples and pears with pears'. Cf C-J Pretorius 'Mistaken payments by a bank on a countermanded or dishonoured cheque – the *condictio sine causa* and *condictio indebiti*: *Saambou Bank Ltd v Essa* 1993 4 SA 62 (N)' (1994) 57 *THRHR* 332 at 337: 'Inadvertent payments by banks on countermanded and dishonoured cheques, may be regarded as *species* of the same *genus*, the *genus* being inadvertent payments by a bank caused by some mistake or other on the part of the bank. In both instances the bank has paid out its own money due to some mistake or oversight on its part and it should, in principle, have an enrichment claim.' They are *species* of the same *genus* (as both cases involve a defect in the relationship between A and B), but there are good policy reasons for distinguishing between the last two categories, as will become clear from the ensuing discussion.

²¹¹ Loewenheim *Bereicherungsrecht* 36: in other words, there is a valid *Anweisung* and only the underlying *Kausalverhältnis* (causal relationship) is void. Cf the example given by Larenz and Canaris *Schuldrecht II/2* at 224: a bank might carry out a transfer order where it was not obliged to do so because B did not have sufficient funds in his account.

²¹² RGZ 60, 24.

²¹³ I have put B in inverted commas in this section, because the instruction did not arise from an underlying contract between himself and A. In other words, there was only purportedly an underlying contract between A and B.

²¹⁴ He merely pretended to deposit the amount in question: see Medicus *Bürgerliches Recht* marg note 678. Also see Larenz and Canaris *Schuldrecht II/2* 224.

²¹⁵ Except the contract of employment, which is irrelevant as the *Anweisung* was not 'covered' by this i.e. it would not amount to a *Deckungsverhältnis*.

office could not sue C directly.

Most writers agree that in such circumstances A must direct its enrichment claim against 'B', and not against C.²¹⁶ In other words, the bank can only bring an enrichment claim against its supposed client. Various justifications have been offered for this result. The supporters of the *Leistungsbegriff* would argue that, in handing the money to C, A did not intend to 'perform' to C in the accepted sense;²¹⁷ A intended to comply with 'B's' instruction and thus to perform to 'B'.²¹⁸ The bank's intention, in honouring the cheque, was to perform vis-à-vis its (supposed) client and not to make a performance (as required by the law of enrichment) to the payee.²¹⁹ As such performance had no legal ground (because the relationship between A and 'B' was defective), A should be able to sue 'B' with a *Leistungskondition*. Or, looking at it from C's point of view, C cannot be said to have received the money as the performance²²⁰ of A (with whom it had no legal relationship at all), but rather as the performance of its debtor, 'B'.²²¹

Canaris, on the other hand, substantiates the same result (i.e. that A should sue 'B') by analysing the interests of the parties.²²² He argues that C should not be exposed to an enrichment action brought by A in such circumstances because he should not be detrimentally affected by a defect in a legal relationship to which he is not party.²²³ To expect him to suffer the consequences of such a defect would be unfair because, unlike

²¹⁶ See, e.g., Larenz and Canaris *Schuldrecht II*/2 224; Koppensteiner and Kramer *Bereicherung* 25.

²¹⁷ Larenz and Canaris *Schuldrecht II*/2 224: according to this view, A was merely acting as a 'Leistungsmittlerin' (i.e. 'conveyor of the performance').

²¹⁸ See, e.g., *Münchener Kommentar/Lieb* § 812 marg note 33; Koppensteiner and Kramer *Bereicherung* 25. Here we see the importance of the fiction that, in cases of *delegatio solvendi*, A's physical handing over to C is regarded in law as his performance to B, and B's performance to C.

²¹⁹ Loewenheim *Bereicherungsrecht* 33; Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 33.

²²⁰ Or in any other way (*in sonstiger Weise*): *Münchener Kommentar/Lieb* § 812 marg note 33. There would accordingly be no basis for a *Nichtleistungskondition* against C. See Larenz and Canaris 225 on the effect of the 'subsidiarity principle' in this regard.

²²¹ Koppensteiner and Kramer *Bereicherung* 25. For criticism of these views, see e.g. Larenz and Canaris *Schuldrecht II*/2 224-5 (e.g. in certain circumstances, C might have had a claim against A, so that A intends to perform to B and C); *Münchener Kommentar/Lieb* § 812 marg notes 34 ff.

²²² See Larenz and Canaris *Schuldrecht II*/2 224. Also see Medicus *Bürgerliches Recht* marg note 678: if the money was owed by B to C, C should be entitled to keep it.

²²³ Larenz and Canaris *Schuldrecht II*/2 225; Koppensteiner and Kramer *Bereicherung* 25. Also see Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 33.

A and 'B', he is not in a position to recognise possible defects or to influence the validity of their underlying relationship.²²⁴ It would also be unfair to require C to carry the risk of 'B's' insolvency; such a risk should properly be carried by B's (purported) contract partner (A),²²⁵ who had the opportunity to evaluate his creditworthiness and so on. Although A was not obliged to hand the money to C, this alone should not entitle A to sue C directly.²²⁶ To sum up, then, any enrichment claim should lie between the parties to whichever 'Kausalverhältnis' (causal relationship) is defective.²²⁷

If it is accepted that it is appropriate that 'B', rather than C, should be exposed to A's enrichment action, one is faced with the following conundrum: what has 'B' received ('erlangt')?²²⁸ In South African terms, how has he been 'enriched'? The first answer given by the writers to this question was that what 'B' had received was the extinction of his obligation vis-à-vis C (i.e. he had been enriched by being freed from his obligation to C in the *Valutaverhältnis*).²²⁹ This reasoning comes to grief *inter alia* when it is applied to cases of 'double fault' (*Doppelmangel* i.e. situations where there is also no valid relationship between 'B' and C). It is also open to the objection that 'B' could argue that he is no longer enriched. The majority view is now therefore that 'B' is obliged to restore the value of the performance.

Lieb also points out that the suggestion that what 'B' receives is his being freed from his obligation to C is inconsistent with the thinking behind the *Leistungsbegriff*: how can one argue on the one hand that A's primary purpose in performing is to extinguish his obligation to 'B', and on the other that he intends to extinguish 'B's' obligation to C?²³⁰ Following Kupisch, therefore, Lieb argues that as a fiction provides the basis for the conclusion that A performs to 'B' legally-speaking even though he physically performs to C, there is no reason why a fiction cannot be used to solve the

²²⁴ Koppensteiner and Kramer *Bereicherung* 25. He should not have to defend himself for a mistake made by an official at the post office: see Larenz and Canaris *Schuldrecht II/2* 224.

²²⁵ Koppensteiner and Kramer *Bereicherung* 25.

²²⁶ Larenz and Canaris *Schuldrecht II/2* 224.

²²⁷ See, e.g., Loewenheim *Bereicherungsrecht* 35.

²²⁸ As required to found enrichment liability under § 812 BGB.

²²⁹ See *Münchener Kommentar/Lieb* § 812 marg note 34.

²³⁰ *Münchener Kommentar/Lieb* § 812 marg note 34.

problem of locating the enrichment. In other words, 'B' can be legally regarded as having received the performance even if it has never formed part of his estate.²³¹ Lieb argues that this has the advantage of being able to explain why A should have an enrichment claim against 'B' even if 'B' had subsequently received the object from C.²³²

Finally, it should be borne in mind that this is only part of the picture. The other general provisions of the law of enrichment also apply in this case, and it should be seen against that backdrop. Thus, for example, a claim would be excluded if A had 'performed' while knowing that it was not obliged to do so.²³³ By way of exception, a direct action would lie directly against C if he had received the money gratuitously in terms of § 822 BGB.²³⁴

South African law

As suggested above,²³⁵ it is questionable whether someone who does not have an underlying relationship with a bank can validly instruct that bank to pay a creditor. It is therefore doubtful whether the situation dealt with in this section could ever arise in practice in a banking context.²³⁶

Outside the arena of banking law, however, analogies may be found. For example, an analogous case in the context of third-party insurance is *Licences and General Insurance Co v Ismay*.²³⁷ Mr Ismay purported to insure his vehicle with the Licences and General Insurance Co. The contract of insurance was later found to be void,²³⁸ however, as its validity was conditional upon the truth of various statements made by Mr Ismay, and one of his statements was false. He and his vehicle were

²³¹ *Münchener Kommentar/Lieb* § 812 marg note 34.

²³² See *Münchener Kommentar/Lieb* § 812 marg notes 35-6 for further justifications.

²³³ § 814 BGB.

²³⁴ According to § 822 BGB, if a recipient hands what he has received to a third party gratuitously, the recipient is obliged to return it, in so far as the recipient is not liable in terms of the law of enrichment. See Appendix A..

²³⁵ At p 190.

²³⁶ Cf the example given by Larenz and Canaris *Schuldrecht II*/2 224 to illustrate this situation.

²³⁷ *Supra*.

²³⁸ See the discussion at 462H-463F (particularly 463A), where the judge overruled that part of the exception which suggested that the contract was voidable, and not void (see the exception at 460C-D).

involved in a car accident with a Chevrolet lorry belonging to a Mr Watson, and he (Ismay) accordingly submitted a claim to the company. The company, unaware that Mr Ismay's statement was untrue, paid for repairs to Mr Ismay's car and for his medical expenses, and it paid Mr Watson in respect of the damage to his lorry.²³⁹ The company later discovered the untruth of Mr Ismay's statement, and approached the court for a declaration that Mr Ismay had been 'unjustly enriched' by the company's payments.²⁴⁰

Both parties agreed that the enrichment action in question would be the *condictio indebiti*²⁴¹ but Mr Ismay excepted to the declaration on various grounds.²⁴² The most important of these was that the company had not alleged '[t]hat the amount which plaintiffs are reclaiming was transferred or paid by plaintiffs or its agents to the defendant.'²⁴³ In other words, it was suggested that the company could not bring a *condictio indebiti* against Mr Ismay as such a remedy can only be directed against 'the actual recipient of the money',²⁴⁴ and the sums in question had been received by third parties²⁴⁵ and not Mr Ismay.

The judge (Sampson J) was not aware of any previous cases which dealt with the issue at hand,²⁴⁶ so he decided the case according to the common law. He first referred to Voet 12.6.9 (relating to D 12.6.44) where he states that 'when the payment is made on behalf of the true debtor, there is an action of *negotiorum gestio* or other similar action against the true debtor by the person who pays; and that the *condictio indebiti* falls away.'²⁴⁷ The judge distinguished the factual situation dealt with by Voet from the present case, however, as he considered that Voet's statement did 'not apparently refer

²³⁹ See the judgment at 459 for the facts.

²⁴⁰ At 459.

²⁴¹ See the judgment at 461 D.

²⁴² See 460 for the exception.

²⁴³ See 460 B.

²⁴⁴ See 461 F.

²⁴⁵ In other words, Mr Watson and presumably the garage which effected the repairs to Mr Ismay's car and the medical service provider that attended to his own injuries – see the declaration at 459 C-E.

²⁴⁶ See 461 G-H, where the judge says that the legal question concerned 'an insurance company's right to recover by *condictio indebiti* or other *condictio* from the insured money paid in terms of a policy to third parties under a mistaken belief of liability....'

²⁴⁷ See 461 H.

to a case in which the payment has been made at the instance or upon the mandate of the true debtor.²⁴⁸ A text which he considered to be more apposite was D 50.17.18, which reads 'quod jussu alterius solvitur pro eo est quasi ipsi solutum esset.'²⁴⁹ In this regard, he referred to Pothier's statement that 'I am understood to pay someone not only when I pay him himself but also when I pay to another on his order.'²⁵⁰ Regarding enrichment in such circumstances, he cited this example mentioned by Voet: an engaged woman owes a dowry to her fiancé and, in accordance with her instruction, someone who erroneously thinks that he is her debtor pays the owed sum to her fiancé.²⁵¹ Voet says that, upon realising his mistake, the party who made the payment could sue the woman with a *condictio indebiti* 'as if what had been paid on her order had been paid to her'.²⁵² The judge went on to quote two further passages from the Digest:²⁵³ 'Qui hominem aut decem tibi aut Titio dari promisit, si Titio partem hominis tradiderit, mox tibi decem numeravit, non Titio set tibi partem hominis condicat (quasi indebitum tua voluntate Titio solverat)'²⁵⁴ and 'ut nihil intersit, jubeam Titio solvare an ab initio stipulatio ita concepta sit.'²⁵⁵

In other words, the judge drew a distinction between the type of situation dealt with in Chapter Two of this thesis (payment of the debt of another without having been instructed to do so) and the situations presently under consideration (payment of the debt of another in accordance with the instruction of the debtor). In both cases, the performing party (A), would be entitled to sue the debtor (B), and not the payee (C).²⁵⁶ In the first case, the appropriate action would not be the *condictio indebiti*, according to Voet, but the *actio negotiorum gestorum*. In the second case, however, the *condictio indebiti* would lie.

²⁴⁸ See 462A.

²⁴⁹ As quoted in the judgment at 462A-B.

²⁵⁰ In his edition of the Digest (12.6.40).

²⁵¹ Voet 12.6.11.

²⁵² See the judgment at 462B-C.

²⁵³ The first of which was relied upon by Pothier as authority for the view cited above. See the judgment at 462D.

²⁵⁴ D 46.3.34.

²⁵⁵ D 46.3.59.

²⁵⁶ The judge commented, in passing, that no action could be brought against the 'actual payees in the case, as the payments were made on behalf of the insured....': see 461G-H.

The judge accordingly held that in principle the company would be entitled to bring a *condictio indebiti* against Ismay.²⁵⁷ He was of the view that the declaration effectively stated that ‘the defendant required the company to dispose of the claims for damage in terms of the policy.’²⁵⁸ Overruling the exception,²⁵⁹ the judge concluded:

I think that the provisions of the policy in regard to payment for repairs to defendant’s car and settlement in his name of third party’s claims for injuries have substantially the same effect as the stipulation in *Digest* (4.3.34); for they provide merely the manner in which the indemnity may be paid. The declaration appears to me to set out sufficiently what amounts to a mandate to the company, and will enable plaintiffs to show that payment of the sums in question was made with the knowledge of defendant.²⁶⁰

I would argue that the word ‘mandate’ was used loosely in this regard,²⁶¹ and that what was really at issue was not a mandate in its true sense²⁶² but an instance of *delegatio solvendi*.²⁶³ That this is so is borne out by the fact that the Digest texts relied upon by the judge are those used as authority for the recognition of this principle by the Romans.²⁶⁴ The case is therefore useful as further evidence that the notion of *delegatio solvendi* exists in South African law.²⁶⁵

Secondly, the case is authority for the view that where B instructs A to perform to his creditor, C, and A does so in the mistaken belief that it (A) validly owed this

²⁵⁷ 462F.

²⁵⁸ 462F.

²⁵⁹ It was alleged in the exception that the defendant had been prejudiced by the payment. The argument was that if the insurance contract were void, then the company should have returned the premiums paid by the defendant, and ‘tendered to place defendant in the position of having all claims and defences intact against the said Watson and arising out of the accident....’ As the premiums had not been returned, ran the argument, and as the company had settled Watson’s claim although the accident was allegedly not due to the defendant’s negligence, the defendant was prejudiced by losing any claims or defences against Watson. The court did not deal with these allegations except to order that they be struck out on procedural grounds (they were allegations of fact which should not have been inserted in an exception made on the basis that a declaration did not disclose a cause of action). See the judgment at 460F-G and 464A-B.

²⁶⁰ At 462F-G.

²⁶¹ As was even done by the Romans: see the discussion above at p 174.

²⁶² In other words, a contract of mandate.

²⁶³ One of the most common contexts in which *Anweisungen* arise in Germany is third-party insurance.

²⁶⁴ Cf the discussion of Roman law above at p 170 ff.

²⁶⁵ Also see *Minister van Justisie v Jaffer supra*.

performance to B, A can recover the amount in question by means of an enrichment action directed against B, and not against the ultimate recipient, C.²⁶⁶ The court thus came to the same result, therefore, as that reached in German law.

It is also significant that the rules applied by the judge in coming to this conclusion echo some of the ideas of German law. Ismay argued that he, Ismay, was not the *recipiens* of the performance made by the insurance company. Ismay was thus arguing that the insurance company had made a *datio* to C, and that the *condictio indebiti* should accordingly be directed against C. The effect of the judgment was to say that a *datio* in law need not be the same as a *datio* in fact.²⁶⁷ In other words, even if A physically hands something directly to C, this could constitute a *datio* to B, if A was acting under B's orders. The South African *datio* thus sounds rather like the German *Leistung*.²⁶⁸

It was assumed that Ismay's debts had been extinguished by the insurance company's performance 'in his name'. As the *datio* required for a *condictio indebiti*²⁶⁹ (within the realm of the traditional enrichment remedies) corresponds to the general requirement of 'enrichment', it can be argued that this decision is authority for the proposition that, in a case like this, B would be 'enriched' by A's payment to C.

As the judge justified his decision purely according to the principles of the common law, he unfortunately did not explicitly refer to the policies at play in such situations. It is likely, however, in the light of more recent pronouncements of the judiciary,²⁷⁰ that a court faced with such a case today would analyse the respective interests of the parties and the policies that underlie the allocation of liability.

²⁶⁶ At least in cases where B was aware of the defect in his relationship with A.

²⁶⁷ Cf the distinction in German law between a factual, or physical, 'handing over' (*Zuwendung*) and a *Leistung*. Refer to the discussion in Chapter One for further details in this regard.

²⁶⁸ Further cases illustrating the widening boundaries of a *datio*, and the consequent expansion of the scope of the *condictio indebiti*, will be discussed at the appropriate places below.

²⁶⁹ And also the *condictiones causa data* and *causa data causa non secuta*.

²⁷⁰ Most importantly, that of the Appellate Division in *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A). For a detailed discussion, see p 216 ff below.

A more recent analogous case is that of *Minister van Justisie v Jaffer*,²⁷¹ which was discussed above.²⁷² That was the case where Hoesein (B) deposited bail with the registrar of the court pending a petition brought by his brother. He then instructed the registrar (A) to pay the sum in question to his (B's) creditor C.²⁷³ A paid C as instructed, but it turned out that B was not entitled to reclaim the bail as his brother was still at large. The case is only analogous in that it appears that there was a valid *Anweisung* in the absence of any enforceable underlying right to the payment.²⁷⁴ Although the court did not give it special emphasis, it appears that the intention of the performing party was important.²⁷⁵ The judgment turned on the nature of the instruction in question and the court finally decided that the Minister's *condictio indebiti* against Jaffer (C) would fail because the payment by A to C had legally been made to Hoesein (B): a *condictio indebiti* could thus only lie against B, and not against C.

(b) Payment in terms of a revoked instruction

The practical situation to be considered in this section is the following: B instructs A to pay his (B's) creditor C. Prior to payment, B withdraws this instruction but A pays C, notwithstanding B's revocation of his instruction. For example, B owes C R3 000 as rental to be paid monthly in advance in terms of a valid contract of lease. By writing a cheque in C's favour B instructs his bank (A) to pay R3 000 to C in respect of next month's rent. Before the bank makes the payment, B countermands the cheque, because he wants to pay another debt that is more pressing. Despite the valid countermand, B's bank (A) pays C. To sum up, the relationship, such a contractual or other obligation, between B and C is valid, and B initially issued a valid instruction to A, but later withdrew it. A nevertheless pays C in accordance with the original instruction.

²⁷¹ *Supra*.

²⁷² At p 175 ff.

²⁷³ See the judgment at 281G-H.

²⁷⁴ In other words, there was a contract between A and B (deposit) but whether it was refundable or not depended on whether B's brother went back to jail when his appeal failed. As B's brother was not in jail at the time when B made the instruction to A, A had no duty to pay B, and B had no right to claim payment.

²⁷⁵ See the judgment at 280A-C and at 280D-E, where the court says '[a]s dit blyk dat die betaling bedoel was om die skuld aan Hoesein te delg....' ('If it appears that the payment was intended to settle the debt to Hoesein....' – my translation).

In both German²⁷⁶ and South African law,²⁷⁷ the countermand of a cheque is regarded as the revocation²⁷⁸ of an instruction by a client to his bank.²⁷⁹ In other words, there is a valid and effective instruction (*Anweisung* in Germany, or mandate – or possibly *delegatio solvendi* – in South Africa),²⁸⁰ which is later withdrawn. The revocation operates *ex nunc*: it is only effective from the moment of revocation onwards,²⁸¹ and has no retroactive effect. In certain circumstances, however, a revocation will not have any effect. For instance, in South African law, it seems that a certified cheque cannot be revoked.²⁸²

²⁷⁶ Meier (1999) 58 *Cambridge Law Journal* 567 at 573; Loewenheim *Bereicherungsrecht* 39, 42; Koppensteiner and Kramer *Bereicherung* 34.

²⁷⁷ Countermand of a cheque, like the receipt of notice of the client's death or his insolvency, will amount to a revocation of the bank's 'duty and authority' to pay a cheque: s 73 of the Bills of Exchange Act 34 of 1964. The actual wording of the section reads as follows: 'The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by – (a) countermand of payment; (b) receipt of notice of the customer's death; (c) receipt of notice of the customer having become insolvent.'

²⁷⁸ See, e.g., the wording of the heading to s 73 of the Bills of Exchange Act 34 of 1964 but cf Malan and Pretorius *Bills of Exchange* 387 who refer to 'termination'. Also see *B & H Engineering v First National Bank of SA Ltd supra* at 288G-H, where the judge of appeal says that '[c]ountermand terminates the duty and authority of a banker to pay a cheque drawn on him by his customer.' If the instruction is regarded as a mandate, and therefore as a contract, then termination would be the correct term; if on the other hand, it is regarded as a unilateral instruction (as in *delegatio solvendi*), then revocation would be the correct term.

²⁷⁹ As opposed to the termination of the banker-client contract: From Malan and Pretorius *Bills of Exchange* 386: The termination of the drawee bank's duty to pay a cheque must be distinguished from the termination of its (banker-client) contract with its client. The latter may be terminated either unilaterally (summarily by the client but only after reasonable notice has been given by the bank) or by agreement. (Or it may be terminated where the client is sequestered, liquidated, placed under judicial management, dies or where the bank or a client which is only a legal person is dissolved. The contract will, on the other hand, not be terminated if the client becomes insane or otherwise loses legal capacity but his cheques will lack any legal effect). Once it has been terminated, all rights and duties come to an end, except for the bank's duty to treat certain information regarding its erstwhile client as confidential.

²⁸⁰ Cf the discussion above at p 175 ff.

²⁸¹ Provided that the countermand is effective, the bank will thereupon acquire a duty to refuse to pay the cheque: Malan and Pretorius *Bills of Exchange* 386 ff. The requirements for an effective countermand are: 'notice must be given to the branch of the drawee on which the cheque is drawn, must unequivocally refer to the cheque which is being countermanded and come to the notice of the drawee bank': Malan and Pretorius *Bills of Exchange* para 214 and the English cases cited there. As was done in *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392 (C) (see the judgment at 407), the drawee bank 'may contract validly that, if it inadvertently pays a countermanded cheque, it may nevertheless debit the account of the drawer with the amount of the paid cheque': Malan and Pretorius *Bills of Exchange* para 214.

²⁸² Malan and Pretorius *Bills of Exchange* para 214: in such a case, a purported countermand would be ineffective i.e. the bank would remain liable.

Whom the bank can sue depends, in German law, on whether the payee was aware of the countermand or not.²⁸³ This awareness is significant for at least two reasons. The first relates to the determination of the performing party's intention (the *Leistungsbestimmung*).²⁸⁴ Secondly, the awareness of the payee is relevant in weighing up the relative interests of the parties; a payee who is aware of a countermand is arguably less worthy of protection than one who accepted payment in ignorance of the countermand. As these factors may also be useful for the analysis of South African law, the discussion that follows will be divided along German lines (i.e. cases where the payee was aware of the countermand will be discussed separately from those where the payee was unaware of the countermand).

(i) Payee was aware of the countermand

In the leading case in German law,²⁸⁵ B sent C a cheque for DM20 000 drawn on bank A. The next day B countermanded the cheque. Whether C knew about the countermand or not was disputed.²⁸⁶ C nevertheless presented the cheque at the bank, which honoured it by mistake. It then debited B's account in the amount of DM20 000 but a few days later reversed this.²⁸⁷ When B later closed his account, the bank deducted the DM20 000 from his balance, alleging that he had been enriched in this amount: by virtue of the bank's honouring the cheque, he had been freed from a liability to C, at the bank's expense.²⁸⁸ The client then sued the bank for this amount.

According to the court,²⁸⁹ assuming that the payee knew that the *Anweisung* had been revoked, he knew that he was receiving the money only because the revocation had been overlooked. He was accordingly aware that the bank was no longer allowed to comply with the order and that the payment was thus not made in terms of a valid

²⁸³ Loewenheim *Bereicherungsrecht* 42.

²⁸⁴ Bearing in mind that this is determined from the point of view of the recipient (i.e. the *Empfängerhorizont*): see the discussion in Chapter One at p 40 ff above.

²⁸⁵ BGHZ 87, 393.

²⁸⁶ See the facts at 394 of the report. Cf Loewenheim *Bereicherungsrecht* 39.

²⁸⁷ See the report at 394. Also see Loewenheim *Bereicherungsrecht* 39 ff; Medicus *Bürgerliches Recht* 509-10; Markesinis *et al* (n 8) at 734-5; Köppensteiner and Kramer *Bereicherung* 35.

²⁸⁸ See 394.

²⁸⁹ At 398. Also see Loewenheim *Bereicherungsrecht* 40-41.

Anweisung.²⁹⁰ From his point of view as recipient,²⁹¹ therefore, the bank's payment did not represent a performance (*Leistung*) to him by B.²⁹² Thus, contrary to the normal rule, the payment cannot be attributed to B.²⁹³ The court therefore held that the bank should proceed directly against C.²⁹⁴

The court then went on to consider the interests of the parties. It was of the opinion that the bank's client (B) had an interest in not being prejudiced by the bank's paying a third party notwithstanding his valid retraction of his original instruction, and that this interest was worthy of protection.²⁹⁵ It held that the bank alone had to carry the risk resulting from this kind of mistake, at least in the event that its client informed the payee of the countermand and thereby did everything to protect himself from the consequences of a mistaken payment.²⁹⁶ In such circumstances, according to the court, the bank could sue the payee directly, whether or not the payee had a claim to this sum arising from his legal relationship to B,²⁹⁷ because the recipient's reliance would not deserve any protection in such a case.²⁹⁸ The court added that the recipient knew that the payment was made by mistake and should not be allowed to take advantage of this error.²⁹⁹

The majority of writers agree that where C knows that he is receiving something on the basis of an *Anweisung* that has been revoked, A cannot sue B, but must proceed directly against C.³⁰⁰ The writers generally also agree with the reasoning of the court.³⁰¹

²⁹⁰ At 398.

²⁹¹ It should be remembered that the direction of the performance (*Leistung*) in German law is decided from the point of view of the recipient – see the discussion of the *Empfängerhorizont* in Chapter One at p 40 ff above.

²⁹² At 398.

²⁹³ At 398. The court went on to say that it was not important whether the payment to C was a *Leistung* or whether C had received the payment 'in sonstiger Weise', as it was clear that the bank had a direct enrichment claim against C.

²⁹⁴ Also at 398. Also see the references cited there.

²⁹⁵ See 398-9.

²⁹⁶ 399.

²⁹⁷ Cf South African law: see below at p 162 and the discussion of *Doppelmangel* in section 3 below.

²⁹⁸ 399.

²⁹⁹ 399.

³⁰⁰ See, for example, Koppensteiner and Kramer *Bereicherung* 35. Both according to the majority opinion and according to the BHG: on the latter see *Jauernig/Schlechtriem* § 812 marg note 38

Markesinis *et al* remark that it seems that ‘the Bundesgerichtshof attaches more importance to whether or not the recipient was *mala fide* rather than to the person who was performing from the perspective of the recipient.’³⁰²

There has been some discussion whether the enrichment action in question would be a *Leistungskondiktion* or a *Nichtleistungskondiktion*. The court did not decide the question,³⁰³ but the weight of opinion seems to be that it (the action against the payee) could not be a *Leistungskondiktion* because the bank did not intend to fulfil an obligation to C, but rather intended to perform to its client, B.³⁰⁴ Moreover, the bank’s payment does not amount to a performance by the drawer to the payee because the determination of performance (*Leistungsbestimmung*) that was originally effective is now removed vis-à-vis the payee.³⁰⁵ In other words, the bank’s original purpose is to perform, in accordance with his instruction, to its client. In the normal course of events (i.e. where the cheque has not been countermanded), this purpose would be fulfilled by the bank’s payment to the payee. The bank would therefore have performed vis-à-vis the client. As this performance (*Leistung A–B*) is in accordance with the bank’s purpose, it would not be entitled to an enrichment claim. If, however, the instruction has been revoked with the payee’s knowledge, then this decision to perform is also removed and the bank cannot be seen to have performed to the payee on its client’s behalf.³⁰⁶ For all these reasons, A’s enrichment action against C must be a *Nichtleistungskondiktion*.³⁰⁷

and the cases cited there.

³⁰¹ See, e.g., Medicus *Bürgerliches Recht* marg note 676: the countermand is thus effective in the *Außenverhältnis* (‘outer/external relationship’) to the recipient. Medicus *ibid*: C should be exposed to the action because he acted in bad faith. Jauernig/Schlechtriem § 812 marg note 38: this takes into account the protection of the *bona fide* recipient’s reliance interest, and the interests of the instructing party (B) that are worthy of protection; if he timeously informed the payee of the countermand, then the latter cannot rely on retaining payment in terms of the *Valutaverhältnis*. Jauernig/Schlechtriem § 812 marg note 37: The instructing party has to prove this knowledge (BGH 87, 400).

³⁰² At 735.

³⁰³ See the judgment at 398.

³⁰⁴ See Medicus *Bürgerliches Recht* marg note 676.

³⁰⁵ Loewenheim *Bereicherungsrecht* 41.

³⁰⁶ Loewenheim *Bereicherungsrecht* 42. Also see Jauernig/Schlechtriem at § 812 marg note 37, where he says that countermand, or any other supervening invalidity of an *Anweisung* can only change the route of the performance in question if the payee knew about the countermand.

³⁰⁷ Loewenheim *Bereicherungsrecht* 41. Despite the subsidiarity principle: Loewenheim *Bereicherungsrecht* 41, 42.

This *Durchgriff* (direct action A–C)³⁰⁸ is not confined to situations involving cheques. It has thus been extended to payments made in terms of standing orders (*Daueraufträge*) that have lapsed or been revoked³⁰⁹ and orders to transfer money (*Überweisungsaufträge*) that have been revoked.³¹⁰ It has also been suggested that a direct action should be brought where C did not actually know but should have known that a mistake had been made,³¹¹ for example where the amount transferred was obviously excessive.³¹²

The only South African case concerning payment by a bank in contravention of a countermand, where the payee was aware of such countermand, is *Natal Bank Ltd v Roorda*.³¹³ Acting through an agent, Roorda concluded a contract for the sale of two plots of land to Cohn. Cohn handed the agent (Schirtel) a cheque in payment. The agent deducted his commission from the original amount and drew another cheque in his own name in Roorda's favour. This was then handed to Roorda. On the same day, before the cheque was presented for payment, Cohn repudiated³¹⁴ the contract of sale and asked Schirtel to stop payment of the cheque. Schirtel thereupon instructed the bank (Natal Bank Ltd) to stop payment of the cheque and wrote to Roorda, informing him that he had been instructed to countermand the cheque and forbidding him from presenting it for

³⁰⁸ When German lawyers speak of a *Durchgriffskondition*, they are not referring to a special category of enrichment remedy (alongside the *Leistungskondition*, or a *Rückgriffskondition*, for example), but they are merely indicating that in a triangular situation, A may sue C directly (with whichever *Kondition* may be appropriate in the circumstances). In other words, the expression *Durchgriff* (which literally means 'grasping through') just emphasises that recourse is directed against C, and not 'via the triangle' (i.e. A–B–C).

³⁰⁹ See, e.g., Loewenheim *Bereicherungsrecht* 41; BGHZ 89, 376: *Dauerauftrag* i.e. standing order for recurring remittances by bank transfer.

³¹⁰ *Überweisungsaufträge* are written instructions handed to the instructing party's bank rather than the payee. These instruct the bank to pay the designated recipient with money from the instructing party's account, and are in very common use in Germany (e.g. a doctor will send an *Überweisungsauftrag* to a patient along with a bill for treatment. The patient must then sign it and hand it in to his or her own bank, which will then transfer the money to the doctor's bank where it will be credited to his or her account). See, e.g., BGHZ 87, 249: carrying out of a countermanded order to transfer money.

³¹¹ See Koppensteiner and Kramer *Bereicherung* 35n47: by way of analogy to § 173 BGB.

³¹² See BGH NJW 87, 186, which dealt with a transfer of too much.

³¹³ 1903 TH 298. See the pleadings at pp 298–300 and the judgment at 301–302 for the facts summarised in this paragraph.

³¹⁴ As the contract had been cancelled, it might be argued that this case should be dealt with as a case of *Doppelmangel*. For a case to fall into that category, however, the underlying contract between A and B (rather than the *Anweisung*) would have to be invalid.

payment. A couple of weeks later, however, Roorda went ahead and did exactly this and, because the ledger clerk had not been informed of the countermand, the bank erroneously paid Roorda the amount on the face of the cheque. Schirtel repaid Cohn the amount originally received from him. Upon realising that the cheque had been paid, Schirtel claimed, and received, a refund from the bank. The relevant parties were thus Natal Bank (the instructed party, A), Schirtel (the instructing party, B)³¹⁵ and Roorda (the payee, C).

The bank (A) then sued Roorda (C) directly for recovery of this amount. In other words, using the German terminology, A sued C with a *Durchgriffskondition*.³¹⁶ The first point to note is that the court impliedly rejected the possibility that the bank's enrichment action should be directed against the drawer (i.e. A-B), as is shown by this sentence:³¹⁷

When Schirtel discovered that his cheque had been cashed he at once claimed a refund of the amount from the Natal Bank, with which, of course, the bank was bound to comply, and it now seeks to recover the amount from the defendant.

The court thus seems to regard it as obvious that the drawer should not have to compensate the bank for its loss and in turn sue C, and that the bank should seek recourse from the payee.

Various arguments were raised by defendant's counsel, for example that the bank had acted negligently and that the defendant had acted *mala fide*. The court chose, however, to base its decision on 'mistake of fact' and the English case of *Kelly v Solari*.³¹⁸ Although it never mentioned it by name, the court presumably had the *condictio indebiti* in mind.³¹⁹ Characterising the error as one of fact (namely 'that the

³¹⁵ Acting on behalf of Cohn.

³¹⁶ See note 308 above.

³¹⁷ At p 302.

³¹⁸ (1841) 9 M & W 54 (152 ER 24), and also *Divisional Council of Aliwal North v De Wet* 7 SC 232 and Van Leeuwen 4.14.4.

³¹⁹ See *Govender v Standard Bank of South Africa Ltd* *supra* at 397H and 398C; *First National Bank of SA Ltd v B & H Engineering* *supra* at 44C-D; and *B & H Engineering v First National Bank of SA Ltd* *supra* at 284G-H, where the court says that the court in *Roorda's* case suggested that it was a *condictio indebiti* at 303 and then says that this was disapproved of in *Govender's* case on

bank on seeing the cheque thought that it had the authority of Schirtel to pay the money, whereas in fact it had not, having, on the contrary, received his express instructions not to pay'),³²⁰ the court allowed the plaintiff's claim.

While the court conceded that the bank had acted negligently,³²¹ it held that it 'fail[ed] to see any such gross negligence on the part of the bank as would disentitle it to succeed with this action....'³²² Moreover, such negligence as there was seemed to have been outweighed in the judge's mind by the fact that 'the defendant ought not to have presented the cheque'.³²³ The court thus implied, first of all, that only gross negligence would exclude such an enrichment claim.³²⁴ This aspect of the decision has been criticised on the grounds that a *condictio indebiti* should not be allowed to a plaintiff who has been negligent.³²⁵ The negligence of the bank in a case like this would surely be inexcusable, or 'so slack that [it would]... not in the Court's view deserve the protection of the law....'³²⁶ It is not at all clear, however, that the action to be brought in such circumstances would be a *condictio indebiti*. In fact, more recent pronouncements of the courts³²⁷ indicate that the appropriate action would be a *condictio sine causa*, in

the ground that it should be a *condictio sine causa* – this was also the decision of the court *a quo* and agreed with by the judge in AD. This may also be seen from the fact that it was mentioned by the defendant's advocate, J de Villiers: see p 301. Eiselen and Pienaar prefer the classification of this action as a *condictio indebiti*, notwithstanding the decision in *B & H Engineering* (see the first edition of their *Unjustified Enrichment* at 207 and 2 ed at 180).

³²⁰ At p 302 of the judgment.

³²¹ At p 303.

³²² At p 303.

³²³ At p 303.

³²⁴ Cf *Govender v Standard Bank of South Africa Ltd supra* at 403F-G, where the court agreed with the *Roorda* decision that the bank would be allowed an action despite its negligence, as it was 'not of so gross a degree as to preclude recovery by the bank.' It should, however, be borne in mind that the court in that case regarded the appropriate action would be a *condictio sine causa*. See the discussion of this case at p 216 ff below.

³²⁵ C-J Pretorius 'Payment by a bank on a countermanded cheque and the *condictio sine causa*: *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A)' (1995) 58 *THRHR* 733 at 734: 'the court relied on the English decision in *Kelly v Solari...* and allowed the enrichment claim of the bank based on the *condictio indebiti* regardless of possible negligence on the part of the bank, which should preclude reliance on this action (cf *Divisional Council of Aliwal North v De Wet supra* at 234; *Union Government v National Bank of SA Ltd* 1921 AD 121 at 126).'

³²⁶ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 224E-F.

³²⁷ See *Govender v Standard Bank of South Africa Ltd supra* at 398D-403C; *First National Bank of SA Ltd v B & H Engineering supra* at 44C-D; *B & H Engineering v First National Bank of SA Ltd supra* at 284G-H. But cf Pretorius (1995) 58 *THRHR* 733 at 735, where the author mentions that some older jurists and some modern writers still prefer the view that it is a *condictio indebiti*.

which case error (and the excusability thereof) would be irrelevant.³²⁸

The judgment implies, secondly, that the conduct of the banker and that of the payee should be measured against objective standards (i.e. the banker: *culpa*; the payee: *bona fides*) and that the conduct of each of the parties should then be compared with that of the other. Awareness of the countermand (*mala fides*) on the part of the payee would apparently weigh more heavily in the scales than negligence on the part of the bank, and would expose the payee to a claim by the negligent bank.³²⁹ Although the court did not deal with the plaintiff's allegation that the defendant had acted *mala fide* in those terms,³³⁰ the defendant's awareness of the countermand clearly influenced the judge's decision.³³¹

It seems, therefore, that the South African court not only came to the same result as its German counterpart, but that its decision was influenced by similar factors: the conduct of the instructing party (i.e. whether he took steps to inform the payee of the countermand and whether the performance should be attributed to him); and the third party's *bona fides* (and hence his worthiness of protection). In so far as the judge suggested that gross negligence on the part of the bank would play a role, however, the approach of the South African court³³² does not tally with the German approach. This suggests that the argument that the remedy should be a *condictio sine causa*, and thus

Eiselen and Pienaar, for example, preferred this view in the first edition of *Unjustified Enrichment* (at 207) and maintain the view in the second edition (at 180).

³²⁸ See, in particular, the views expressed by Rose-Innes J in *Govender's case supra*, outlined at p 225 ff below.

³²⁹ Although there is also a slight suggestion that any detriment on the part of the payee should also enter into the enquiry: see p 303, where the judge, in remarking that the bank had apparently not acted grossly negligently, said that the payee had also apparently suffered no detriment.

³³⁰ But cf Malan and Pretorius *Bills of Exchange* 363: 'No special significance was attributed by the court to the fact that the payee knew that the cheque had been countermanded or that the bank might have been negligent....'

³³¹ See, for example, p 302: 'It is abundantly clear that long before he paid the cheque into his own bank in order that it might be presented to the Natal Bank, the defendant was aware that Schirtel had stopped payment of the cheque, and he had been directed by Schirtel not to present it for payment.' Later on the same page, he said '[i]t is clear to me that presentment should not have taken place, the defendant having been informed that the payment of it had been stopped', and 'his proper course was to have sued Schirtel for the amount and not to have presented a cheque which he knew Schirtel had directed the bank not to honour.' Also see p 303: '... the defendant ought not to have presented the cheque'.

³³² Also see the comments regarding *Govender's case supra* in footnote 324 above.

that the bank's negligence is irrelevant, is justified not only on the basis of legal doctrine, but also in terms of policy. Finally, it is interesting to note that both courts used an approach which weighed up the interests of the parties (although this was not made explicit in *Roorda's* case), and that this leads to exactly the same results in both systems. The approach of the German court, however, is to be preferred in that the balancing of the parties's interests was discussed openly and in detail.

While there is no other reported case where a bank has paid a *mala fide* payee in contravention of a countermand, various *obiter* comments may be found in more recent decisions. Some of these relate to the identification of the remedy in such cases, as mentioned above, and have to some extent been superseded by the approach recommended in the *McCarthy Retail* decision.³³³ Other comments are more significant, however. For example, the significance of the payee's awareness of the countermand was discussed in *Govender v Standard Bank of South Africa Ltd*.³³⁴ The court said that the awareness of the payee made *Roorda's* case

an *a fortiori* case. To present a cheque for payment aware that payment had been stopped is *mala fide* and fraudulent, since it amounts to a representation to the bank that the drawer has ordered the bank to pay the money, knowing that the drawer has instructed the bank not to do so. We have no doubt that a bank in those circumstances is not precluded from reclaiming the payment despite carelessly overlooking the countermand of payment, since it was led into the error by the fraud of the payee and to fall into a trap of that kind is not gross negligence.³³⁵

The court thus implied that the *mala fides* of a payee in such circumstances would automatically rule out gross negligence on the part of the bank. This clearly suggests that the payee's awareness of the countermand is the decisive factor, as in German law.³³⁶ Characterising the payee's presentation of the cheque in such circumstances as a fraudulent misrepresentation muddies the waters, however, as it implies that the bank might be able to sue the payee for delictual misrepresentation, rather than unjustified

³³³ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA). This was reiterated by Schutz JA in *First National Bank of Southern Africa Ltd v Perry NO and Others supra* at 969H-I. Also see Chapter One at p 15 above.

³³⁴ 1984 (4) SA 392 (C).

³³⁵ At 403G-I.

³³⁶ Cf the comments of Markesinis *et al* (n 8) at p 212 above.

enrichment. This aspect of the judgment has drawn criticism. According to Stassen,³³⁷ for example, it is not clear that the payee would be making a fraudulent misrepresentation in these circumstances as the agreement between the drawer and the payee envisages that the payee present the cheque to the bank for payment, and this agreement is not terminated by the countermand.³³⁸

One other judicial observation of *Roorda's* case warrants attention. In *B & H Engineering v First National Bank of SA Ltd*,³³⁹ the Appellate Division remarked that the question whether the payee had been enriched was not discussed by the court in *Roorda's* case.³⁴⁰ As pointed out above, this is one of those early decisions where the court applied English law and then, almost as an afterthought, added that '[t]he principles of the Roman-Dutch law are similar'.³⁴¹ The relevant question, according to the judge, was therefore whether there had been a mistaken money payment, and not whether the payee's net financial position had been increased thereby. Even if the judge had applied the traditional requirements of the *condictio indebiti*, he would not have had to ask whether there was 'enrichment' in the modern sense, but merely whether there was a *datio* viz a payment of money or transfer of other property. The bank had clearly given money to *Roorda*,³⁴² and that was sufficient. Were such a case to arise now, however, it would have to be approached differently.

The weight of authority suggests that the remedy to be used in such cases is the *condictio sine causa*. From recent cases dealing with this remedy, it seems that the

³³⁷ J C Stassen 'Countermanded cheques and enrichment – some clarity, some confusion' 1985 *Modern Business Law* 15 at 20.

³³⁸ For further discussion of this point, see Stassen *op cit*.

³³⁹ *Supra*.

³⁴⁰ See the judgment of the Appellate Division at 294B: '*Roorda's* case *supra*, which also dealt with a claim against a payee for return of money paid by a bank in the face of a countermand, did not consider the question whether the payee had been enriched. It is consequently of no assistance for present purposes.' Also see the discussion of this case at p 247 ff below.

³⁴¹ See the judgment at 303, where the court cites Van Leeuwen 4.14.4 and *Divisional Council of Aliwal North v De Wet supra* as authority.

³⁴² Via his bank. The court apparently did not find that there was any reason to regard A's act of performance to C as constituting *datio*es A–B and B–C. Cf the comments regarding the *recipients* of a payment at p 207 above. Also see *Phillips v Hughes, Hughes v Maphumelo* 1979 (1) SA 225 (N) and *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A).

current approach of the Supreme Court of Appeal is to ask two questions: was C enriched and, if so, was the enrichment *sine causa*?³⁴³ In order to decide whether C is enriched, it is thus necessary to establish whether the bank's payment discharged B's liability to C, assuming that such liability existed at the time of the payment.

In *Roorda's* case, B and C were linked by a contract of sale. The purchaser was therefore obliged to pay the purchase price to Roorda, and Roorda was to transfer ownership of the plots of land. As the contract of sale had been 'repudiated' (and presumably cancelled) before the bank paid Roorda, the case could arguably be dealt with as a case of *Doppelmangel*. It has been discussed in this section, however, because there was at least initially a valid contract between B and C, and because the existence or absence of a contractual relationship between B and C was not taken into account by the judge. The reasoning of a modern court faced with a factual situation analogous to that of *Roorda's* case would probably run as follows: if C had not yet transferred ownership of the land to B, B would not be liable for the purchase price (unless the contract stipulated otherwise);³⁴⁴ as C would therefore have no right to the purchase price, the bank's payment would not extinguish any obligation;³⁴⁵ C would therefore be enriched by the payment; and such enrichment would be *sine causa* because A had no duty to make the payment (whether directly to C or via B) and C had no right to receive it. On the other hand, if C had already made counter-performance to B, B would be liable for the purchase price; the bank's payment would discharge this obligation;³⁴⁶ C would therefore simultaneously receive the money and lose the claim against B and would therefore not be enriched; the enriched party would thus be B.

Would the fact that B breached the contract of sale (by repudiation in *Roorda's* case) have any significance? If B breached the contract of sale and countermanded the cheque (prior to delivery and the bank's payment), C would have the right to cancel the

³⁴³ And the court tends to focus on the first question. See, e.g., p 247 ff below.

³⁴⁴ According to the normal rules of contract, the duty to pay the purchase price is conditional upon delivery of the goods in terms of a contract of sale.

³⁴⁵ In other words, the acquisition of the money would not be 'cancelled out' by the loss of a claim.

³⁴⁶ See the discussion of *B & H Engineering v First National Bank of SA Ltd supra* at p 247 ff below.

contract and to sue for contractual damages for any loss suffered. In such circumstances, it might be argued that C would have a right against B, which could be discharged by the bank's payment (i.e. the acquisition of the money would be 'cancelled out' by the loss of a claim against B). This is doubtful, however, because the obligation to pay damages for breach of contract is not the same as the obligation to make performance in terms of that contract, and a bank's payment cannot discharge any obligation other than the one that the drawer originally intends to discharge. The fact that the bank is paying in contravention of a countermand should not make any difference. What should therefore happen in such circumstances is that A should sue C for enrichment (provided that counter-performance had not been made), and C should sue B for breach.

Applying the enrichment-requirement in this fashion leads to the same result as in German law and *Roorda's* case, without having to enquire into the *mala fides* of the recipient, or the negligence of the bank. It remains to be seen, however, whether a modern South African court seised of such a matter would choose to balance the interests of the parties, or to use the more mechanical approach described in the previous paragraph.

(ii) Payee was not aware of the countermand

It is more likely that a payment will be made in accordance with an already revoked instruction to a recipient who is unaware of such revocation. What follows is a slightly simplified version of the facts of one such case that arose in Germany. In payment of a debt, B handed C a cheque for DM80 000 drawn on bank A.³⁴⁷ Before C cashed the cheque, differences arose between himself and B, on account of which B instructed bank A in writing to stop the cheque. Later on the same day, A confirmed that the cheque had been stopped. C, apparently unaware of the countermand,³⁴⁸ presented the cheque for

³⁴⁷ BGHZ 61, 289 (this is a slightly simplified version of the facts). For the facts contained in this paragraph, see the report at 289-90. For discussion of this case see, e.g., Medicus *Bürgerliches Recht* marg note 676; Loewenheim *Bereicherungsrecht* 39 ff; Koppensteiner and Kramer *Bereicherung* 34.

³⁴⁸ This does not appear from the recital of the facts at the beginning of the report, but from the

payment at the bank several days afterwards. The cashier overlooked the countermand and paid C DM80 000.

The bank brought an enrichment claim against C for the amount of the cheque. The court held that such a direct action would not be allowed, and that the bank would have to sue its client (B). The majority of writers agree that in such circumstances the bank will only have a claim (a *Leistungskondiktion*) against its client.³⁴⁹ First of all, the bank's payment represents a performance by the drawer (B) to the payee (C) which extinguishes the drawer's obligation to the payee.³⁵⁰ The drawer is thus no longer obliged vis-à-vis the payee and has therefore been enriched³⁵¹ by being freed from this obligation. (It would be different if C knew of the countermand, as he would then not be under the impression that the payment of the cheque constituted a performance of B, who had stopped the cheque, and the debt would therefore not be extinguished.) In other words, if C has a due and effective claim against B, B will be freed from this obligation by the bank's payment and is to this extent enriched. If C has no such claim, it will arguably be a case of *Doppelmangel*, which will be discussed below.³⁵²

Secondly, with regard to the *Leistungsbegriff*, the court assumes that the existence of a countermand would not change the bank's purpose in honouring the cheque; in paying the cheque, the bank intends to perform to its client, and if it honours the cheque by mistake in contravention of a valid countermand, its purpose will still be performance to its client. The bank's *Leistung* vis-à-vis B took place without legal ground (the original *Anweisung*, which would have provided a legal ground for the transfer to C rather than to B, has been revoked), and A should therefore sue B with a *Leistungskondiktion*.

Moreover, from a policy perspective, the bank's error in overlooking the

judgment itself: see, e.g., pp 294-5 of the judgment.

³⁴⁹ See, e.g., Loewenheim *Bereicherungsrecht* 42; Koppensteiner and Kramer *Bereicherung* 34.

³⁵⁰ Loewenheim *Bereicherungsrecht* 41.

³⁵¹ In other words, he 'received something', as required by § 812 BGB.

³⁵² See section 3 below. Briefly, either B will have a *Leistungskondiktion* against C which the bank can claim from B (*Kondiktion der Kondiktion*), or the bank can sue B for the value of the claim.

countermand is 'rooted' in the legal relationship between the bank and its client; it has nothing to do with the payee. The countermand happened unbeknownst to him and he presented the cheque in good faith. The bank's error should therefore not affect him adversely in exposing him to a possible enrichment action. From his point of view, the payment of the cheque appears to be the payment of B, and his reliance on the regularity of the payment should be protected.³⁵³

B, on the other hand, deserves less protection, because he did not inform C of the countermand.³⁵⁴ As Köndgen points out, the risk that a bank might overlook a countermand is a risk that must be borne by the client, and not by the payee.³⁵⁵

Two of the most discussed³⁵⁶ South African cases dealing with the question of cheques in the context of enrichment fall into this category viz *Govender v The Standard Bank of South Africa Ltd*³⁵⁷ and *First National Bank v B & H Engineering*.³⁵⁸ These judgments will be considered in detail in order to assess the merits of the different lines of argument and to highlight factors taken into account by the judges in coming to their

³⁵³ Loewenheim *Bereicherungsrecht* 41.

³⁵⁴ Loewenheim *Bereicherungsrecht* 41.

³⁵⁵ See Koppensteiner and Kramer *Bereicherung* at 34. According to Kupisch, if one considers the case of an *Anweisung* in the broad sense from an economic point of view, it does not present any problem because the economic value moves from the bank A to the payee C via the drawer of the cheque and not directly from A to C. Consequently, by the bank's payment to C, B is freed from his obligation to C and is thus enriched. His account at the bank (i.e. his claim against the bank) is credited and so he is simultaneously impoverished by the same amount. In other words, his enrichment and impoverishment cancel each other out. The bank, A, is also freed from its obligation to B and is thus enriched. A has paid out the equivalent amount of money so is impoverished (i.e. its enrichment and impoverishment cancel each other out). C receives the payment and is correspondingly enriched. At the same time, however, C loses his claim against B and is thus impoverished. Again, his enrichment and impoverishment cancel each other out. So nobody is ultimately enriched. See B Kupisch 'Die Bankgarantie auf erstes Anfordern im Dickicht des modernen Bereicherungsrechts – zum ungerechtfertigten Vorteil des Garantienehmers? – Vom dogmatischen Nutzen einer wirtschaftlichen Betrachtungsweise für das Dreipersonenverhältnis' [1999] 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2381.

³⁵⁶ See, e.g., June D Sinclair and Coenraad Visser 'Law of negotiable instruments' 1984 *ASSAL* 377 at 384-5; Cowen (1983) 16 *CILSA* 1 at 10 and 17-18; Sassen 1985 *Modern Business Law* 15; C J Nagel and M Roestoff 'Verrykingsaanspraak van bankier na betaling van afgelaste tjek' (1993) 56 *THRHR* 486 at 494: 'Dit is inderdaad 'n Medusa-agtige probleemangeleentheid waar die oplossing van een probleem aspek maar net 'n volgende kop laat uitsteek.' ('It is indeed a Medusa-like problem where the solution of one problematic aspect simply causes yet another head to protrude.')

³⁵⁷ *Supra*.

³⁵⁸ *Supra* and *B & H Engineering v First National Bank of SA Ltd supra*.

conclusions.

Govender v Standard Bank of South Africa Ltd³⁵⁹

The facts which gave rise to *Govender v Standard Bank* were as follows:³⁶⁰ Saaïman and Govender entered into a contract in terms of which Govender agreed to provide a bus and a driver to transport passengers to a funeral. Saaïman was to pay initially and the passengers were to reimburse him, at least partially, for the hire of the bus. After Saaïman had paid Govender by a cheque drawn on the Standard Bank, one of the passengers managed to hire a bus more cheaply elsewhere. He accordingly untruthfully told Saaïman that he had cancelled the contract with Govender and that Saaïman should stop payment of the cheque. Saaïman, who believed that the contract had indeed been cancelled, accordingly countermanded the cheque. He did so by completing and signing a form which said 'I shall be pleased if you will kindly stop payment of the undermentioned document, on the understanding that I have no claim against the bank in the event of such document being inadvertently paid by the bank.'³⁶¹ On the appointed day, Govender's bus and driver awaited the passengers, but they never arrived.³⁶² Govender was unaware that the cheque had been stopped³⁶³ and deposited it in his account at Barclays Bank.³⁶⁴ Apparently due to an error of one of its employees, Standard Bank paid Govender the relevant amount (via his bank) and debited Saaïman's account correspondingly.³⁶⁵ When Saaïman queried this, the bank reversed the debit and asked Govender's bank to reverse the payment and the credit to Govender's account. As his bank refused to do so, Standard Bank sued Govender for repayment.³⁶⁶ The bank's claim was upheld in the Magistrate's Court³⁶⁷ and Govender took the case on appeal to the Cape Provincial Division of the Supreme Court.

³⁵⁹ *Supra.*

³⁶⁰ See the judgment at 393-395I.

³⁶¹ See the judgment at 394H-I.

³⁶² 395D.

³⁶³ See 395C-D.

³⁶⁴ See 395D-E.

³⁶⁵ See 395E-G.

³⁶⁶ See 394G-H and 395H-I.

³⁶⁷ See 393H.

The first question considered by Rose-Innes J³⁶⁸ was whether the bank's claim was a *condictio indebiti* or a *condictio sine causa*.³⁶⁹ The relevance of this question is obviously that proof of an excusable error is required for a *condictio indebiti* but not for the other *condictiones*.³⁷⁰ The judge was of the opinion that the *condictio sine causa* would be the more appropriate remedy in cases such as these.³⁷¹ His reasons for deciding that the facts of this case did not 'fit comfortably'³⁷² within the parameters of the *condictio indebiti* related mainly to the content and nature of the error requirement.

Regarding the content of the error, he stated that the plaintiff (the bank) must have mistakenly believed that it owed the payment to the recipient (the payee, Govender).³⁷³ In other words, party A must have paid C in the erroneous belief that he and C were linked by an obligation.³⁷⁴ According to the judge, the bank is not liable to the payee and the bank knows that it owes nothing to the payee.³⁷⁵ He went on to say that if there was any debt to the payee³⁷⁶ – as there was in this case – it was owed by the drawer, and not by the bank.³⁷⁷ He added that, while the bank is obliged to honour its client's cheques in terms of its underlying contract with its *client*, the bank has no such obligation vis-à-vis the *payee*.³⁷⁸ The judge concluded that, as the bank did not mistakenly believe that it owed the payment to Govender, the *condictio indebiti* could not lie.³⁷⁹ In passing, he also rejected the suggestion that 'a bank in paying a cheque is under the impression that it is paying a debt which is owing by another on whose behalf

³⁶⁸ See 396-404.

³⁶⁹ Cf the advocates, who both assumed that it was indeed a *condictio indebiti* (see 396B-C). Their arguments thus revolved around the question whether the bank had been negligent or not.

³⁷⁰ See the judgment at 396C, 400D-G. The whole question of categorisation of cases according to the traditional scheme of remedies is now not as crucial as it once was, in the light of the case of *McCarthy Retail Ltd v Shortdistance Carriers CC supra*. Also see 396D of the *Govender* case *supra*: 'A formalistic approach ... should be avoided where possible.'

³⁷¹ See, e.g., 400B-C, 403C, 404A-B.

³⁷² 398D.

³⁷³ At 398H.

³⁷⁴ In other words, that he had a duty to pay C and that C had a right to claim that payment.

³⁷⁵ In other words, there is no obligation A-C. See the judgment at 398D.

³⁷⁶ And he pointed out that there may be circumstances in which there is no obligation to pay the payee at all (i.e. where neither the bank nor the drawer is obliged – vis-à-vis the payee – to pay the payee) e.g. where the drawer wants to make a donation to him: see 398H *in fin*.

³⁷⁷ In other words, if anybody had an obligation vis-à-vis C, it would be B (i.e. B-C). See the judgment at 398E.

³⁷⁸ In other words, the bank's only obligation is to B (i.e. A-C). See the judgment at 398G-H.

³⁷⁹ At 399C-D.

it is discharging the debt' (i.e. that this is the type of situation considered in Chapter Two of this thesis) on the grounds that, more often than not, 'a bank neither knows nor is concerned to know nor gives any thought to whether or not there is a debt owing by the drawer to the payee of the cheque'.³⁸⁰

Regarding the nature of the error, the judge considered the requirements that the payment be made due to an error of fact and that the error should be neither *supina nec affectata*. He held that although the bank had made an error of fact,³⁸¹ such error did not cause the payment of an *indebitum* because the payment would have been made *indebite* whether or not the cheque had been stopped, as the bank had no debt vis-à-vis the payee.³⁸² He then discussed the question of negligence, as it relates to the rule that a party will not be entitled to a *condictio indebiti* if he acted *supina aut affectata*.³⁸³ Much of what he said in this regard has been superseded by *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*³⁸⁴ and need not concern us. What is of interest for our purposes, however, is that after outlining certain principles of English law concerning payments made due to negligent errors, the judge remarked that they were 'not inconsistent with the relief which is afforded by a claim for which the *condictio sine causa* is the appropriate remedy'.³⁸⁵ During the course of his judgment, Rose-Innes J repeatedly stated that the appropriate remedy in this case was a *condictio sine causa specialis*. Rather confusingly, however, he kept reverting to arguments concerning the *condictio indebiti*.³⁸⁶ For instance, he held that for the purposes of the *condictio sine causa*, the payment need not be the result of any error 'whether reasonable or

³⁸⁰ See the judgment at 399A-C.

³⁸¹ 399G: the mistake of fact was 'that the cheque was a subsisting order to pay, whereas it had been countermanded.' Cf the judge's earlier comment that '[i]t is difficult to understand how the bank ... laboured under an error of fact causing a belief that it was discharging a debt' (at 399D) because the bank knew that the cheque had been stopped prior to payment. The judge was of the view that the error lay in the fact that the bank had forgotten or 'overlooked that the cheque had been stopped' (at 399F) and that the facts were analogous to those of *Kelly v Solari supra*.

³⁸² See 399I-400B.

³⁸³ See pp 400-403.

³⁸⁴ 1992 (4) SA 202 (A).

³⁸⁵ At 403C.

³⁸⁶ Perhaps because the arguments of counsel had focused on this remedy. See, e.g., the discussion of the English cases mentioned above, and his remarks at 403I-404A.

unreasonable',³⁸⁷ but went on to cite with approval the view expressed in *Roorda's* case³⁸⁸ that the negligence in that case 'was not of so gross a degree as to preclude recovery by the bank.'³⁸⁹ In view of his conclusion, however, these remarks appear to be *obiter*.

The judge finally decided the case according to the requirements of the *condictio sine causa specialis*. He held that, with this remedy,³⁹⁰

money which has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise, or some other obligation or lawful ground for passing of the money to the recipient, may be recovered to the extent that the recipient has thereby been enriched at the expense of the person whose money it was.³⁹¹

He accordingly identified the two main requirements as being that the defendant must have been enriched by the payment (taking into account whether he made a counter-performance which was 'juridically connected' with the payment of the money or whether the payment was gratuitous) and that such enrichment be *sine causa*.³⁹²

Applying these rules to the facts of this case, the judge held that Saaiman had owed Govender payment in terms of their contract,³⁹³ (that Govender had tendered counter-performance),³⁹⁴ and that the bank's payment had discharged this debt.³⁹⁵ There was some confusion regarding the question of the bank's performance of Saaiman's obligation. The judge quoted the following passage from Pothier as authority for the proposition that someone may discharge another's obligation without authorisation (i.e. a

³⁸⁷ At 400G.

³⁸⁸ *Supra*.

³⁸⁹ At 403F-G: 'Our conclusion in the circumstances is the same.'

³⁹⁰ Citing the following authorities: Grotius 3.30.18; De Vos *Verrykingsaanspreeklikheid* 2 ed at 69; *Trahair v Webb and Co* 1924 WLD 227. Regarding the latter case, he said (at 397E) that there was 'a close enough analogy between the claim for recovery of money paid by way of a loan where the recipient had no authority to borrow and the present claim of the bank for recovery of money paid by way of payment of a cheque which the bank had no authority to pay since payment was countermanded....'

³⁹¹ At 397F. He adds the proviso that the circumstances must be such that the *condictio indebiti* would not apply. Also see the discussion of the scope of the *condictio sine causa* at 400C-G.

³⁹² See 404D-405C

³⁹³ 405C-D.

³⁹⁴ 405D-E

³⁹⁵ 405H-406D.

Chapter Two-type situation):³⁹⁶

It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided that it is made in his name, and in his discharge, and the property is effectively transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will....³⁹⁷

The judge was then faced with the difficulty that a bank does not intend to discharge its client's debt,³⁹⁸ as he himself had pointed out earlier in the judgment. He brushed this aside, however, stating that

[w]here ... a cheque is drawn and given by the drawer by way of conditional payment of a debt, then the payment of the cheque by the bank upon whom it is drawn without doubt, in our opinion, renders the payment by the cheque an absolute and final payment which discharges the debt of the drawer, even if the bank in honouring the cheque is not concerned whether or not that is the effect.³⁹⁹

Significantly, he added that from Govender's point of view, the bank's payment was payment of Saaiman's debt,⁴⁰⁰ echoing the German view that the purpose of the performing party (*Leistungsbestimmung*) is determined from the recipient's perspective (*Empfängerhorizont*).⁴⁰¹

The court accordingly held that, as the payment had discharged a debt, Govender's receipt of the money was 'juridically connected' with his counter-performance.⁴⁰² The money had not been acquired *sine causa* because it had discharged an obligation.⁴⁰³ Moreover, said the court, Govender had not been enriched by the payment because he had made counter-performance as required in terms of the

³⁹⁶ See the discussion by D H van Zyl 'Unauthorised payment and unjust enrichment in banking law' 1998 *TSAR* 177 at 192-3.

³⁹⁷ See the judgment at 405I, quoting from the formulation in *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A).

³⁹⁸ See 405I-406A.

³⁹⁹ 406B and also see 405G-H.

⁴⁰⁰ 406C-D.

⁴⁰¹ Cf the criticism of this aspect of the judgment by Stassen 1985 *Modern Business Law* 15 at 16.

⁴⁰² 406C-D.

⁴⁰³ 406E.

contract.⁴⁰⁴

Finally, the court considered the question whether the bank had been impoverished by the payment to Govender. The form that Saaiman had filled in when countermanding the cheque indemnified the bank if it inadvertently⁴⁰⁵ paid the countermanded cheque. In other words, the bank was entitled to debit Saaiman's account in the amount of the cheque, even though it paid the cheque in contravention of a countermand. The bank was consequently not impoverished by the payment to Govender;⁴⁰⁶ the impoverished party was the drawer of the cheque.⁴⁰⁷ The court accordingly held that the bank could not argue that it was impoverished by the payment to Govender, seeing that it elected not to rely upon the indemnity, and reversed the debit of Saaiman's account.⁴⁰⁸ The court therefore dismissed the appeal.

The academic reception of this judgment was mixed. Some hailed it as a 'landmark decision',⁴⁰⁹ while others rued its effects and called for legislation to clarify matters.⁴¹⁰ It was criticised for leaving this area of law in 'a state of grave uncertainty',⁴¹¹ for ignoring the academic literature on the topic,⁴¹² for not weighing up policy considerations,⁴¹³ for being inconsistent,⁴¹⁴ and for introducing problems of

⁴⁰⁴ 406F-G.

⁴⁰⁵ Which the judge interpreted as synonymous with 'negligently': see 407G-I. Also see Van Zyl 1998 *TSAR* 177 at 193.

⁴⁰⁶ See 406H-407G.

⁴⁰⁷ See 408H.

⁴⁰⁸ At 408I-409A.

⁴⁰⁹ Stassen 1985 *Modern Business Law* 15.

⁴¹⁰ See Sinclair and Visser 'Law of negotiable instruments' 1984 *ASSAL* 377 at 384. Cf Nagel and Roestoff (1993) 56 *THRHR* 486 who comment at 494 that this call would probably not be heeded by the legislature.

⁴¹¹ Sinclair and Visser 1984 *ASSAL* 377 at 384.

⁴¹² Stassen 1985 *Modern Business Law* 15 and Sinclair and Visser 1984 *ASSAL* 377 at 384. At that stage, academic opinion was fairly evenly balanced between those for and against giving the bank a claim against the payee; Sinclair and Visser 1984 *ASSAL* 377 at 384; Nagel and Roestoff (1993) 56 *THRHR* 486 at 487.

⁴¹³ Sinclair and Visser 1984 *ASSAL* 377 at 384, and by implication, Pretorius (1994) 57 *THRHR* 332 at 336.

⁴¹⁴ Sinclair and Visser 1984 *ASSAL* 377 at 385: the court says no proof of negligence necessary for *condictio sine causa* but judgment 'contains a statement that seems to contradict this proposition (at 403C).' Cf Stassen 1985 *Modern Business Law* 15, who seemed to ignore this contradiction and to regard the judgment as one of the 'welcome clarifications of a hitherto obscure part of the law....' (at 15).

proof.⁴¹⁵

As far as the substance of the judgment went, most of the criticism focused on the court's finding that A's payment to C discharged B's obligation to C. For example, Sinclair and Visser argued that the debt owed by B to C was not discharged by the bank's payment⁴¹⁶ because the bank paid in its own name, in the execution of its mandate from its client, and not in the client's name.⁴¹⁷ The debt B–C was accordingly, in their view, 'as irrelevant as the fact that the payee might have been owed money by any other person.'⁴¹⁸ Secondly, while they agreed that B's payment to C by cheque was conditional upon the bank's payment, it would only become final (i.e. unconditional) when the bank paid *in terms of its mandate*.⁴¹⁹ They therefore concluded that the money had been paid and received *sine causa* and the bank should be entitled to recover the payment from C.⁴²⁰ (They added the rider, however, that '[t]he bank's right to recover ... may well have to be qualified in cases where a contractual right exists in the bank's favour to recoup its loss from the drawer.'⁴²¹)

Stassen, on the other hand, agreed with the court's view that the bank's payment

⁴¹⁵ Practical problems in that in order to prove that C was enriched *sine causa*, the bank would have to prove stuff re internal relationship between B and C. Pretorius (1994) 57 *THRHR* 332 at 334–5; Sinclair and Visser 1984 *ASSAL* 377 at 385.

⁴¹⁶ This was also the view of Van Zyl 1998 *TSAR* 177, who argued (at 192–3) that the court had misinterpreted Pothier's views. Cf Stassen 1985 *Modern Business Law* 15 at 17.

⁴¹⁷ See Sinclair and Visser 1984 *ASSAL* 377 at 387 and the following at 385: 'The drawee bank, it is submitted, was not purporting to discharge an indebtedness owed by the drawer to the payee. Its (mistaken) purpose was merely to obey its mandate. It paid in its own name, not as the agent of the drawer. This being so, the payment did not fall within the rule in *Froman v Robertson* 1971 (1) SA 115 (A) that a payment without authority but in the name of the debtor and in his discharge induces extinction of the obligation.' Cf D J Joubert 'Verhandelbare dokumente: die verrykingsaanspraak van die betrokke bank' (1993) 9 *De Jure* 76, who argued that the bank is the *solvens* (at 81) and does not pay as the agent of the drawer (at 82), and therefore that the bank must recoup its loss from the payee and may not debit the drawer's account even if the bank's purpose in making the payment was to debit the drawer's account and not to pay its own debt. The only circumstances in which he felt that the bank could have a claim against the drawer are where the bank's payment resulted in the payee's loss of a claim against the drawer (at 83).

⁴¹⁸ At 387. Also see 385.

⁴¹⁹ At 385. Cf Stassen 1985 *Modern Business Law* 15 at 17, who seems to regard payment as becoming final once the bank pays, whether or not it does so in terms of a mandate from its client.

⁴²⁰ See 385, 387.

⁴²¹ At 387. Also see p 237 below.

discharged B's debt to C,⁴²² but argued that this did not result in C's enrichment. He pointed out that, if the bank's payment extinguished the liability B–C, C's acquisition of the money would be cancelled out by his loss of a contractual right against B.⁴²³ In Stassen's view, the court was incorrect to take into account Govender's tender of counter-performance in determining whether and to what extent he was enriched. He contended that such counter-performance (C–B) was not a detrimental side-effect of the bank's payment (A–C), and that it was therefore irrelevant.⁴²⁴

While there were also differences of opinion regarding the interpretation of the indemnity clause,⁴²⁵ there seems to have been general agreement amongst the commentators that if the clause were interpreted as meaning that the drawer would have no claim to compel the reverse of the debit, it would enable the bank to avoid the risk of loss.⁴²⁶ Sinclair and Visser agreed with the court's finding that the bank 'brought about its own loss' by deciding to reverse the debit of the drawer's account notwithstanding the existence of the indemnity, and therefore that the bank's enrichment claim against C should be affected by its contractual relationship with the drawer.⁴²⁷ They were of the view that '[i]n the light of the difficult balance that has to be struck in avoiding over-readiness to give effect to the bank's prima facie right to recover a payment made under a mistake of fact, on the one hand, and an unjust denial of recovery, on the other, the court's decision on this particular issue seems fair.' Their view thus seems to be that, as a matter of policy, A should be able to sue C, unless B has indemnified A for mistaken payments. To say that A can sue C unless A can sue B, and to call this 'an equitable

⁴²² Because of the conditional agreement between the drawer and the payee: see his article at 17.

⁴²³ At 17. Also see J C Stassen and A N Oelofse 'Terugvordering van foutieve wisselbetalingen: geen verrykingsaanspreeklikheid sonder verryking nie' 1983 *Modern Business Law* 137 at 140, 143, and 145-6.

⁴²⁴ Stassen 1985 *Modern Business Law* 15 at 17-18, where he also raised the problems that might arise where the actual value of the counter-performance was at issue. Stassen agrees with De Vos that one must imagine that the enriching-event had not occurred, and whichever losses would also not have occurred, may be regarded as 'detrimental side-effects', which may be subtracted from the amount of the enrichment. Here, he says that Govender would still have tendered counter-performance even if the bank's payment had not occurred, so the counter-performance cannot be regarded as a side-effect of the bank's payment. (It was a consequence of Saaiman's handing over the cheque). Cf Joubert (1993) 9 *De Jure* 76 at 83.

⁴²⁵ Sinclair and Visser 1984 *ASSAL* 377 at 386 cf Stassen 1985 *Modern Business Law* 15 at 19-20.

⁴²⁶ See, e.g., Sinclair and Visser 1984 *ASSAL* 377 at 386; Van Zyl 1998 *TSAR* 177 at 192.

⁴²⁷ At 386.

balance between the competing interests of the bank and the recipient of the payment'⁴²⁸ seems strange. This approach seems to me to tip the balance too much in favour of the bank (which would in principle always be entitled to an action to recover the loss caused by its own mistake) and to put the payee at an unfair disadvantage (as his legal position would be dependent upon a clause that may or may not have been included in a contract between the drawer and his bank).⁴²⁹

First National Bank of South Africa v B & H Engineering⁴³⁰

The opportunity arose for the courts to consider some of these views less than ten years later, in the case of *First National Bank of SA Ltd v B & H Engineering*.⁴³¹ The legal dispute concerned a payment by cheque in terms of a contract between Sapco and B & H Engineering. According to the contract, Sapco owed B & H payment for goods manufactured and delivered by B & H. In settlement of this debt, Sapco gave B & H a cheque for R16 048 (dated 2 December 1988), drawn on its account with First National Bank. B & H accepted the cheque in payment of the debt.⁴³² On the same day (2 December), acting *bona fide*, B & H deposited the cheque in its account at Standard Bank. Later on the same day, Standard Bank requested special clearance from First National Bank and sent the cheque to the automated clearing bureau, which subsequently forwarded the cheque to First National Bank. Neither B & H⁴³³ nor Standard Bank was aware that the cheque had already been countermanded by Sapco⁴³⁴ and, at all times, both parties acted *bona fide*. Due to a lack of communication between

⁴²⁸ At 387.

⁴²⁹ In other words, if the payee were sued by the bank, his best defence would be to show that the drawer had indemnified his bank against such mistaken payments, and that the bank's action should therefore fail. In *Govender's* case *supra*, the payee was fortunate in that the indemnity was stated on the form that contained the countermand, so the bank presented it in evidence. If, however, the indemnity were contained in the general underlying banker-client contract, the payee would be hard pressed to provide evidence thereof. In such a case, practically speaking, the bank's action against the payee would not be subject to the limitation suggested by Sinclair and Visser 1984 *ASSAL* 377. Cf also the view expressed by Nagel and Roestoff that such indemnifications may no longer be possible: see Nagel and Roestoff (1993) 56 *THRHR* 486 and Pretorius (1995) 58 *THRHR* 733 at 736-7.

⁴³⁰ 1993 (2) SA 41 (T).

⁴³¹ *Supra* and see *B & H Engineering v First National Bank of SA Ltd supra*.

⁴³² See the judgment of the Appeal Court at 284C-D.

⁴³³ See the judgment of the Appeal Court at 284E.

⁴³⁴ The trial judge found that notice of the countermand had reached First National Bank prior to presentment of the cheque: see the TPD judgment at 42D-E.

the relevant employees of First National Bank, the cheque was honoured despite the countermand.⁴³⁵ In honouring the cheque, First National Bank 'acted *bona fide* but negligently.'⁴³⁶ On 6 December, B & H was informed that the cheque had been paid on 2 December.

First National Bank sued B & H Engineering in the Transvaal Provincial Division of the Supreme Court on the basis of unjustified enrichment. Referring to *Natal Bank v Roorda*⁴³⁷ and *Govender v Standard Bank of South Africa Ltd*,⁴³⁸ as well as various academic writings,⁴³⁹ the court *a quo* (per Preiss J), agreed that the appropriate enrichment action in such a case would be the *condictio sine causa*.⁴⁴⁰ It seems from the judgment, however, that the judge regards the *condictio sine causa* as being synonymous with a general enrichment action, as he only asks whether B & H was enriched and whether such enrichment was unjustified.⁴⁴¹

The judgment focuses on the first question viz whether B & H was enriched,⁴⁴² and more particularly on the relevance of the fact that, as in *Govender's* case, the payee (B & H) had a valid claim against the drawer (Sapco). B & H argued that it had not been enriched by the payment, which had merely extinguished Sapco's obligation to pay B & H for the goods.⁴⁴³ The plaintiff's lawyer, on the other hand, attacked *Govender's*

⁴³⁵ For the facts stated in this paragraph, see 42E-43J of the TPD judgment and 284D-F of that of the AD.

⁴³⁶ 284E-F of the AD decision.

⁴³⁷ *Supra*.

⁴³⁸ *Supra*.

⁴³⁹ Sinclair and Visser 1984 *ASSAL* 377 at 384-5; F R Malan 'The rule in Price v Neal' (1978) 11 *CILSA* at 276; Cowen (1983) 16 *CILSA* 1 at 10 and 17-18; Stassen 1985 *Modern Business Law* 15.

⁴⁴⁰ 441 of the TPD judgment. This aspect of the judgment was approved of by writers such as Nagel and Roestoff (1993) 56 *THRHR* 486 at 488.

⁴⁴¹ The judge, in citing the terms of the stated case, says (at 44B-D) that the relevant 'questions are: (a) Whether the defendant was unjustifiably enriched and (b) Whether the payment to the defendant was *sine causa*.' These questions are, with respect, badly stated. If the answer to the first question is that the defendant was *unjustifiably* enriched, then there is no need to ask the second question; 'unjustifiable' means '*sine causa*'. The first question thus conflates two separate enquiries (viz: (a) was the defendant enriched? (b) is this enrichment unjustified/*sine causa*?) and renders the second question redundant. This may seem pedantic, but stating the questions clearly and unambiguously helps one arrive at clear and unambiguous answers.

⁴⁴² It seems just to be assumed (and not expressly stated) that, if B & H was enriched, it was at the expense of First National Bank.

⁴⁴³ 44A of the TPD judgment.

case for holding that the payee had not been enriched in such circumstances because he had tendered a counter-performance which had a juridically relevant connection with the enrichment.⁴⁴⁴ 'He argued that the cambial relationship between the parties to the cheque is too far removed from the contractual relationship in respect of which the cheque was furnished.'⁴⁴⁵ The judge implies that this argument is supported by Sinclair and Visser,⁴⁴⁶ and cites their view (with reference to *Govender's* case) that the bank's purpose in making the payment was not to discharge the drawer's debt to the payee, but to 'obey its mandate'. In other words, as mentioned above,⁴⁴⁷ Sinclair and Visser's argument is that in such cases the bank's intention is to fulfil its own obligation to its client and not to fulfil its client's obligation to the payee.⁴⁴⁸ They state that the bank (in *Govender's* case) 'paid in its own name and not as the agent of the drawer. This being so, the payment did not fall within the rule in *Froman v Robertson* 1971 (1) SA 115 (A) that a payment without authority but in the name of the debtor and in his discharge induces extinction of the obligation.'⁴⁴⁹

The judge goes on to consider the judgment of Goff J (as he then was) in the English case of *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another*⁴⁵⁰ in which, according to Preiss J, the facts were essentially the same.⁴⁵¹ In that case, the bank was entitled to recover its payment (from the recipient) as it had been made under a mistake of fact. Preiss J attaches particular importance⁴⁵² to the following statement taken from the judgment of Goff J: a claim to money paid under a mistake of fact may fail *inter alia* if

⁴⁴⁴ See the judgment at 45C.

⁴⁴⁵ See the judgment at 45D.

⁴⁴⁶ He says that '[i]n this regard counsel finds himself in good company.' See the judgment at 45D-E.

⁴⁴⁷ At p 229.

⁴⁴⁸ Also see Stassen 1985 *Modern Business Law* 15 at 16 and D P Visser 'Unjustified enrichment' 1993 *ASSAL* 229 at 232.

⁴⁴⁹ See Sinclair and Visser 1984 *ASSAL* 377 at 385 and the judgment of Preiss J at 45G-H.

⁴⁵⁰ [1979] 3 All ER 522 (QB).

⁴⁵¹ See the judgment of Preiss J at 45H-I. Also see Van Zyl 1998 *TSAR* 177 at 186 ff for a concise summary of the facts and a consideration of the court's findings.

⁴⁵² Cf the comments of Preiss J at 45J-46A: 'I have been careful not to pay undue regard to this decision of the English Court in a situation where the *condictio sine causa*, foreign to English law, has to be considered. Nevertheless, the judgment contains a valuable indication in my view as to the precise legal nature of an inadvertent payment by a bank despite the stop instruction.' See Nagel and Roestoff (1993) 56 *THRHR* 486 at 490.

the payment is made for good consideration, in particular if the money is paid to discharge and does discharge a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt.⁴⁵³

In other words, A cannot reclaim a mistaken payment to C if such payment discharges a debt A–C, or a debt B–C where there is a valid authorisation B–A. Preiss J, however, goes slightly further and interprets the statement as meaning that '[p]ayment will defeat a bank's claim where it has been made under authority to discharge the debt or *in the name of the debtor*' (my emphasis).⁴⁵⁴ This implies that there are two instances where a payment (or other performance) made by the payee would block a claim for restitution of the payment to the payee (i.e. where the payment to the payee would not be regarded as having enriched him): (a) where the payment to the payee had been made by a third party in the name of the debtor, and (b) where the payment to the payee had been made by a third party who had been authorised to make this payment by the debtor. This is just another way of stating the circumstances in which the 'performance' of a third party will extinguish the debt of another: category (a) corresponds to the situations dealt in Chapter Two of this thesis (sometimes called the Pothier rule, or the rule in *Froman v Robertson*)⁴⁵⁵, and category (b) to the *Anweisung* situation or one where the third party acted as B's agent.

He then goes on to state that Goff J does not regard a bank's payment in contravention of a countermand as a 'payment in the name of the debtor'.⁴⁵⁶ (In other words, it is not a Chapter Two-type situation.) Immediately following this statement,⁴⁵⁷ Preiss J quotes a passage from Goff J's judgment, in which that judge says, *inter alia*, that

since the drawer had in fact countermanded payment the bank was acting without mandate and so the payment was not effective to discharge the drawer's obligation on the cheque. From this it follows that the payee

⁴⁵³ See *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another* *supra* at 535E-G and the judgment of Preiss J at 46C.

⁴⁵⁴ See his judgment at 46D.

⁴⁵⁵ *Supra*.

⁴⁵⁶ At 46E.

⁴⁵⁷ At 46E-F of his judgment.

gave no consideration for the payment and the claim cannot be defeated on that ground.⁴⁵⁸

Here, Goff J is clearly referring to the second category mentioned above (i.e. where a third party is authorised to pay the debt of another). In other words, what Goff J is saying is that the payment (A–C) did not discharge the debt B–C because it was neither authorised by the drawer (B)⁴⁵⁹ nor did it fall within the scope of the rules allowing a third party to perform in terms of the obligation of another.⁴⁶⁰ It is not clear whether Preiss J cites the passage from Goff J's judgment as support for his statement that a bank's payment is not 'payment in the name of the debtor' (i.e. conflating the two categories) or whether he (correctly) cites it in contrast, as the passage is cited without comment.⁴⁶¹

Also without comment, Preiss J then⁴⁶² quotes a passage from Malan's *Bills of Exchange, Cheques and Promissory Notes in South African Law*,⁴⁶³ in which the author sets out the English law in much the same terms as Goff J but adds that

[h]owever, it is suggested that in our law the drawee bank should be entitled to recover the amount of a forged, unauthorised or countermanded cheque from the payee only if both the payment and the acquisition of the instrument and receipt of its proceeds by the payee were without legal ground.⁴⁶⁴

Preiss J goes on to quote Cowen's opinions⁴⁶⁵ of the *Barclays Bank* case at length.⁴⁶⁶ He (Cowen) interprets Goff J as stating that 'when a bank pays its customer's

⁴⁵⁸ At 542e–g of the judgment of Goff J.

⁴⁵⁹ In other words, A did not act as B's agent or mandatary.

⁴⁶⁰ In other words, A did not discharge B's debt to C in terms of the English equivalent of the rule discussed in Chapter Two at p 65 ff above.

⁴⁶¹ Cf Nagel and Roestoff (1993) 56 *THRHR* 486 at 491, where they state that the judge cited this passage with 'klaarblyklake goedkeuring'.

⁴⁶² At 46G–1 of his judgment.

⁴⁶³ The 1983 edition at 282.

⁴⁶⁴ Cf the aside in Nagel and Roestoff (1993) 56 *THRHR* 486 at 491, where the authors point out that the judge apparently did not realise that Malan and De Beer thus proposed a 'double *causa*-requirement', and that this had been called into question by, *inter alia*, Stassen and Oelofse 1983 *Modern Business Law* 137 at 140.

⁴⁶⁵ Expressed in his article in (1983) 16 *CILSA* 1 at 23–24 and 37

⁴⁶⁶ From 46J to 47J.

cheque it *pays as the customer's agent*' (Cowen's emphasis).⁴⁶⁷ If one accepts this, it follows that if the bank had been properly authorised by its customer, its payment would be payment as agent and hence extinguish its customer's debt and, if it had not been so authorised, the bank would not be acting as its customer's agent, its payment would not extinguish its customer's debt, and the bank would be entitled to restitution. In Cowen's opinion, however, the bank neither acts as its client's agent,⁴⁶⁸ nor intends to discharge its client's debt (according to the rules adopted by our courts in *Froman v Robertson*).⁴⁶⁹ He agrees with Stassen that a conditional payment (B–C) by cheque discharges the customer's debt to the payee when the condition is satisfied by the bank's payment (A–C), not because the bank acts as the customer's agent, but because the customer and his creditor enter into an agreement in terms of which payment is subject to the condition that the 'order in the cheque will be obeyed by the bank. Accordingly, when the bank pays the cheque, in compliance with its duty to its customer, the condition is satisfied and the debt is discharged.' He goes on to argue that where 'no valid order to pay exists (e.g. where the "cheque" is a forgery), there can be no fulfilment of the "condition" upon which the "cheque" was taken. In the result, the debt owed by the customer to the payee remains undischarged, and the receipt of the money by the payee is *sine causa*.'⁴⁷⁰

In other words, where a bank (A) gives money to a payee (C) in terms of a validly drawn cheque, Cowen does not regard the 'payment' by the bank to the payee as the payment of the drawer (B) by virtue of a relationship of agency between the drawer and the bank (B–A). He also does not consider the case as one where the bank (as a third party) pays the debt of another (i.e. as in the situations dealt with in Chapter Two). He rather focuses on the instrument itself; when B hands the cheque to C, B and C impliedly agree that this payment is conditional upon the bank's honouring the cheque. If the bank honours the cheque, the condition is fulfilled and the payment becomes final

⁴⁶⁷ Cowen (1983) 16 *CILSA* 1 at 23. See the judgment of Preiss J at 47A.

⁴⁶⁸ Cowen (1983) 16 *CILSA* 1 at 23: 'I cannot agree that a bank, when paying its customer's cheques acts as its customer's agent when paying a duly drawn cheque. The bank, although it acts pursuant to the order ("mandate" in one sense of that ambiguous and misleading term) contained in a cheque, pays or "honours" the cheque as a principal.' See Preiss J's judgment at 47C.

⁴⁶⁹ *Supra*. See Cowen (1983) 16 *CILSA* 1 at 24 and Preiss J's judgment at 47D.

⁴⁷⁰ Cowen *loc cit*.

and B's debt to C is discharged. If the bank does not honour the cheque, however, the condition fails and the cheque will not extinguish the debtor's obligation.

If, on the other hand, the bank mistakenly gives money to the payee in circumstances where there is no valid cheque, Cowen is of the view that the condition implied in B's handing the (invalid) 'instrument' to C⁴⁷¹ cannot be fulfilled, B's payment to C cannot become final, and B's debt to C will not be discharged. In such circumstances, C will still have a claim against B, C will therefore be enriched by the bank's 'payment', this enrichment will be *sine causa*, and the bank will be entitled to its recovery (whether or not it acted negligently).

Preiss J regards Cowen's analysis as 'incontrovertible'⁴⁷² and accepts that the bank's payment on the 'countermanded cheque was not payment effected in its capacity as the drawer's agent'⁴⁷³ and that the bank's payment also did not operate to discharge Sapco's debt to B & H in terms of the *Froman v Robertson* rule.⁴⁷⁴ He then rather inconsequentially refers to the bilateral nature of payment in our law, without comment.⁴⁷⁵ Finally, he refers to Sinclair's view that the correct reason why the bank in *Govender*'s case should not have succeeded in its claim was that it had chosen not to exercise its indemnification against inadvertent payment.⁴⁷⁶ He distinguishes this from *Govender*'s case in that in the present case there was no such indemnification.

The judge concludes that 'the performance rendered by the defendant was [not]

⁴⁷¹ In other words, the condition that 'the order in the cheque will be obeyed by the bank': Cowen (1983) 16 *CILSA* 1 at 24.

⁴⁷² At 47J.

⁴⁷³ At 47J. Again this is ambiguous: is he implying that the bank was the drawer's agent but that payment in contravention of a countermand fell outside that authority, or is he excluding the agency-analysis altogether? It seems that he is doing the latter, but the wording is unclear. See Nagel and Roestoff (1993) 56 *THRHR* 486 at 492: 'Such bank is a *solvens* in its own right and does not act as the agent of its client (the drawer). The payment of the bank is therefore *sine causa*.' (My translation).

⁴⁷⁴ At 48A-C.

⁴⁷⁵ At 48C-D.

⁴⁷⁶ Confusingly, the judge says (at 48D-E) 'the bank should fail because it had received an indemnification from the drawer which *he* chose not to exercise.' (My emphasis).

juridically connected with its receipt of the money'⁴⁷⁷ and declines to follow the judgment in *Govender*'s case. Although he does not say so explicitly, he apparently concludes that the debt had not been discharged.⁴⁷⁸ He accordingly holds that the requirements of the *condictio sine causa* had been met.⁴⁷⁹ In other words, the bank's claim against the payee succeeded. In German terms, the court granted a *Durchgriffskondiktion* (A-C).⁴⁸⁰

This case also evoked a mixed response from academics. On the one hand, it was welcomed in view of the paucity of case law in this area,⁴⁸¹ and even lauded as constituting 'a huge stride forward'⁴⁸² and 'a refreshingly new insight into a hitherto somewhat nebulous sphere of law'.⁴⁸³ On the other hand, it was criticised for compounding the uncertainty regarding a legal question that is of enormous practical significance both for commercial banks and also the broader public,⁴⁸⁴ by following an approach that was 'diametrically opposed' to that of the Cape court in *Govender*'s case and thus causing a conflict between the law applicable in different provinces.⁴⁸⁵ Again,

⁴⁷⁷ At 48E-F. In other words, he goes even further than the plaintiff's lawyer, who argued that the relationships were too far removed from one another (at 45D); the judge suggests that there is no connection at all. See Nagel and Roestoff (1993) 56 *THRHR* 486 at 492: 'Any performance by the payee as a consequence of the underlying relationship is not juridically relevant to the receipt of the payment by the bank – it can therefore not be seen as a detrimental side-effect of any possible enrichment at the expense of the bank which can be brought into the equation against his "enrichment".' (My translation.)

⁴⁷⁸ Nagel and Roestoff (1993) 56 *THRHR* 486 at 492: 'the payment by the bank has no influence on the underlying relationship between the drawer and the payee, in other words neither the drawer's duty to perform nor the payee's claim is extinguished.' (My translation).

⁴⁷⁹ At 48F-G.

⁴⁸⁰ And C would have to seek recourse (in terms of the law of contract) against B: see Nagel and Roestoff (1993) 56 *THRHR* 486 at 492: 'The logical consequence of the above is that the payee, who must compensate the bank, will usually have to proceed against the drawer for payment on the merits in terms of the underlying relationship.' (My translation.) Regarding the meaning of 'Durchgriffskondiktion', see note 308 above.

⁴⁸¹ See, e.g., Nagel and Roestoff (1993) 56 *THRHR* 486 at 487; Visser 1993 *ASSAL* 229.

⁴⁸² Van Zyl 1998 *TSAR* 177 at 193.

⁴⁸³ Van Zyl 1998 *TSAR* 177 at 194.

⁴⁸⁴ On the commercial importance of the issue, see for example, Visser 1993 *ASSAL* 229; Nagel and Roestoff (1993) 56 *THRHR* 486 at 487; Sinclair and Visser 1984 *ASSAL* 377 at 384.

⁴⁸⁵ Nagel and Roestoff (1993) 56 *THRHR* 486 at 487; Pretorius (1994) 57 *THRHR* 332 at 333; *idem* (1995) 58 *THRHR* 733 at 734. Cf Visser 1993 *ASSAL* 229, who was of the view that the case confirmed the *Govender* approach because '[a]lthough the court did not allow the action in *Govender*'s case, it clearly would have done so if it had found that, on the facts, the defendant had been enriched and the plaintiff impoverished.' Also see Nagel and Roestoff *op cit* at 493 where they argue (by applying the rules to a hypothetical case) that although the approaches of the Transvaal and Cape courts follow different routes, they arrive at the same practical

there was a call for the courts to take policy considerations into account.⁴⁸⁶

The case also revived the debate as to which enrichment action would be more appropriate in these circumstances. For example, while D P Visser approved of the judgment in general (and agreed that the bank should sue the payee),⁴⁸⁷ he suggested, on policy grounds, that it would be preferable for the bank to sue the payee with the *condictio indebiti* rather than the *condictio sine causa*.⁴⁸⁸ In his view, the effect of allowing banks to use the *condictio sine causa* in such cases is to treat banks differently from other plaintiffs who have made mistaken payments (who would normally have to use a *condictio indebiti*): whereas banks can reclaim payments made due to unreasonable mistakes, other plaintiffs would be barred from reclaiming such payments.⁴⁸⁹

He also expressed the opinion that the argument 'that the *condictio indebiti* is not applicable in this situation because the bank knows that it is not a debtor of the payee and therefore does not mistakenly believe that it owes a debt to the payee, distorts the elements of the *condictio indebiti*.'⁴⁹⁰ His argument ran as follows: the original rationale for the *condictio indebiti* was that there was no *causa* for the retention of a performance if there was a failure of the purpose of that performance, and he suggested that an example of such a purpose would be the payment of a debt.⁴⁹¹ The South African *condictio indebiti* also 'presupposes a performance, [he continued,] but not

destination (viz the bank is afforded relief and the other two parties are left to deal with problems arising from their underlying contract between themselves) except in cases where another party is involved eg where the payee negotiated the cheque to someone who *bona fide* gave value for the cheque and satisfied all the requirements for *reëlmatige houerskap* (was a holder in due course?).
⁴⁸⁶ See, e g, Pretorius (1994) 57 *THRHR* 332 at 336: 'Ultimately and apart from anything else, in determining whether the recipient's performance was juridically connected with its receipt of the bank's money, the court may have to take policy considerations into account. The fact that a contract existed between the recipient and drawer of the cheque does not automatically mean that this is juridically relevant as far as the bank's enrichment claim against the recipient is concerned. The question is: what policy considerations may sway a court to prefer one of these conflicting decisions above the other?' Unfortunately, he does not answer this question.

⁴⁸⁷ See Visser 1993 *ASSAL* 229 at 235: 'the judgment of Preiss J is, in my view, correct.'

⁴⁸⁸ See Visser 1993 *ASSAL* 229 at 230-33. Also see Pretorius (1995) 58 *THRHR* 733 at 734-36.

⁴⁸⁹ Visser 1993 *ASSAL* 229 at 233.

⁴⁹⁰ Visser 1993 *ASSAL* 229 at 233.

⁴⁹¹ In other words, if such debt exists, the purpose is fulfilled and no *condictio* will be available; on the other hand, if such debt did not exist, the purpose would be frustrated and there would be no *causa retinendi*: see Visser 1993 *ASSAL* 229 at 230-1.

necessarily a performance to the payee.’⁴⁹² Following the lead of German law, he pointed out that the bank’s purpose in paying C is to fulfil the terms of the banker-client contract and its ‘performance’ is thus directed towards B, not C.⁴⁹³ ‘In a regular situation the bank, by paying a cheque drawn on it, achieves the purpose of this performance and therefore cannot claim with the *condictio indebiti*.’⁴⁹⁴ In an irregular situation, on the other hand, the purpose of the bank’s performance to the customer is frustrated and the bank can therefore bring a *condictio indebiti* against the payee.⁴⁹⁵ He finally concluded, however, that ‘even though an argument can be made out for the *condictio indebiti* as the appropriate vehicle for the bank’s claim in certain circumstances, it is clear that the application of the *condictio sine causa* is not so inappropriate that it must be rejected out of hand.’⁴⁹⁶

Finally, there was disagreement amongst the commentators as to the correctness of the court’s finding that the bank’s payment had failed to discharge the debt owed by Sapco to B & H. D P Visser, while he took issue with the court’s definition of ‘payment’,⁴⁹⁷ approved of its conclusion that the debt had not been extinguished.⁴⁹⁸ In his view,

in order for the payment of a cheque to have the effect of discharging a debt, there must be a continuing intention to pay the debt. If the drawer’s intention to pay the debt falls away (as manifested by the countermand), there is no intention to pay the debt on anyone’s part, because the bank never has the intention to pay a debt when honouring a cheque.⁴⁹⁹

What the author seems to mean by ‘continuing intention’ is that there must be an intention to discharge the obligation at the moment when the bank pays C. Therefore, as neither the bank nor the drawer intended to discharge B’s obligation at the time when the bank handed over the money,⁵⁰⁰ in his view, the debt could not be extinguished.

⁴⁹² Visser 1993 *ASSAL* 229 at 231.

⁴⁹³ Visser 1993 *ASSAL* 229 at 231 and 232.

⁴⁹⁴ At 232.

⁴⁹⁵ At 232.

⁴⁹⁶ At 233.

⁴⁹⁷ Visser 1993 *ASSAL* 229 at 234-5.

⁴⁹⁸ See Visser 1993 *ASSAL* 229 at 234 and 235.

⁴⁹⁹ Visser 1993 *ASSAL* 229 at 234. For support of this point of view, see Van Zyl 1998 *TSAR* 177.

⁵⁰⁰ Although the drawer originally intended to discharge his debt to the payee by means of a cheque, he changed his mind when he countermanded the cheque.

Coenraad Visser, on the other hand, regarded the court's decision that the debt (B–C) had not been discharged as incorrect because

the effect of the bank's payment on the underlying obligation [i.e. B's obligation to C] is determined exclusively by agreement between the drawer and the payee. Where the agreement provides that the obligation be discharged by payment by cheque, the countermund is irrelevant: where the cheque is paid on presentment, the obligation is discharged. Accordingly, the bank's claim in *B & H Engineering* should have failed on the basis that the recipient of payment had not been enriched by the bank's payment of the cheque – payment by the bank simultaneously brings the amount of the cheque into the recipient's estate and extinguishes his contractual claim against the drawer, so that the end result is that his estate is no better off after payment has taken place than it was before.⁵⁰¹

The main difficulty that I have with some of the views expressed above is that, with respect, they look at the problem too narrowly.⁵⁰² It is like trying to make sense of one or two unconnected (and particularly cryptic) pieces of a jigsaw puzzle when what one should really do is collect together all the pieces, sort them into categories, work out how they relate to each other, connect them up, and only then look at the big picture. It might be useful, therefore, before considering how the Appellate Division approached the matter, to restate the relevant rules in simple terms.

The first thing to bear in mind that these rules are drawn from various areas of law: contract, property, negotiable instruments and unjustified enrichment. Secondly, while no one relationship should be seen in isolation, it helps to sort the relevant rules into those applicable to relationships between A and C, A and B, and B and C, before looking at the broader context to see how they all fit together.

⁵⁰¹ Coenraad Visser 'Payment systems and unjustified enrichment: a survey of recent developments' 1993 *Annual Banking Law Update* 109 at 122. Cf Van Zyl 1998 *TSAR* 177 at 194n105: 'This is clearly erroneous since it takes no account of the relationship between the bank and customer and the legal effect of countermunding a cheque.'

⁵⁰² Cowen and Coenraad Visser, for example, focus mainly on the relationship between the drawer and the payee. D P Visser seems to emphasise the intention in the 'relationship' between the drawee and the payee. Cf Cowen, on the other hand, who considers all the relationships in the context of the others.

The relationship A–C: When A gives money to C by honouring B's cheque, ownership of that money will either be transferred to C by *commixtio* (e.g. if C cashed the cheque at a branch of A) or by a book entry (e.g. if C deposited the cheque in an account held at a collecting bank).⁵⁰³ The money therefore goes directly from A to C (or his agent). This transfer will take place whether or not the cheque has been countermanded.

A and C are not linked by any contract or by any other obligation. A accordingly owes nothing to C, and C has no right to claim anything from A. The crucial question is what effect the transfer A–C has on the other two relationships.

The relationship A–B: A and B are linked by a contract, in this case a banker-client contract. If B instructs A to pay a cheque, A 'performs' to B by doing so (and A's intention is accordingly directed towards B, regardless who actually receives the money). In exchange, B pays A the relevant bank charge for honouring a cheque and A is authorised to debit B's account for the amount of the cheque.

The banker-client contract does not allow A to give money to a third party in B's name without B's authorisation, and, in general, it does not allow A to debit B's account in the amount of any payments not validly authorised. Therefore, if B makes out a cheque in C's favour and then withdraws the instruction by countermanding the cheque, the bank has no authorisation to give money to C (or anyone else) in B's name, nor to debit B's account (unless there is a specific contractual provision to this effect, as there was in *Govender's* case).

If the bank pays C despite B's countermand, the bank's performance cannot be regarded as having taken place in terms of the underlying contract with B, and such performance would accordingly be unowed vis-à-vis B.

The relationship B–C: In the situation presently being considered, B and C are linked

⁵⁰³

See *First National Bank of Southern Africa Ltd v Perry NO and Others supra* at 967H-J.

by reciprocal obligations, e g those arising from a contract. C⁵⁰⁴ performs to B in terms of this contract (by providing transport in *Govender's* case⁵⁰⁵ and by delivering materials in the case of *B & H Engineering*).⁵⁰⁶ Such performance discharges C's obligation to B.

In exchange, B is to perform to C by paying for the transport or the materials. It is clear that this performance could be made by B himself, by someone else whom he has appointed to make the payment on his behalf, or by someone else acting without authorisation. In other words, the first three ways in which B's obligation to C will be extinguished are:

- a. B himself pays C (e g where B gives C the relevant amount in cash). In other words, B performs to C in terms of the obligation B–C.
- b. B appoints an agent to make the payment on his behalf (e g where B asks his brother A to give C the relevant amount in cash). In such circumstances, A's handing the money to C would legally be regarded as B's 'performance' to C in terms of the obligation B–C.
- c. The obligation B–C would also be extinguished if a third party (X) pays the relevant amount to C in the circumstances outlined in Chapter Two above (i e where X intends to extinguish B's obligation to C, without any authorisation by B, and it is not a case of *persona delectae*.) Here, A's handing the money to C does not legally constitute B's performance to C, but is a performance by A which nevertheless has the effect of extinguishing B's obligation to C. This has sometimes been called the 'Pothier rule' or the 'rule in *Froman v Robertson*.

The first two cases are legally regarded as performance by B himself, while (c) is regarded as performance by a third party.

Clearly, B's obligation to C will also be extinguished if B pays C by cheque, C agrees to accept a cheque instead of cash, and B's bank (A) honours the cheque (i e A transfers money to C).

⁵⁰⁴ Or his agent, or mandatary, or some other authorised person, provided that personal performance by C is not necessary.

⁵⁰⁵ *Supra*.

⁵⁰⁶ *Supra*.

The first question is whether this falls into one of the three categories just outlined, or whether it occupies a further category.

Firstly, when a bank pays a cheque, it does not pay as a third party. To extinguish B's obligation to C on this ground, A would have to intend to settle B's debt.⁵⁰⁷ As pointed out by the judge in *Govender's* case and by Sinclair and Visser, the bank does not intend to settle B's debt (and it might not even know whether B has a debt at all). Payment by cheque therefore does not fall into category (c).

As pointed out in the introduction to this chapter, B also does not appoint the bank to pay as his agent: 'The bank, although it acts pursuant to the order ("mandate" in one sense of that ambiguous and misleading term) contained in a cheque, pays or "honours" the cheque as a principal.'⁵⁰⁸ It does not pay C as B's representative.

In this situation, although B hands C a cheque in payment (and intends thereby to pay C), this cannot – at least at that moment – be regarded as the equivalent to payment by cash⁵⁰⁹ because it does not constitute final performance by B to C, as C does not immediately receive the money.⁵¹⁰ Payment by cheque is thus conditional upon the payee's receiving the money from B's bank.⁵¹¹ If the cheque is honoured, the condition is fulfilled, and B's debt to C is discharged. In other words, a legal fiction comes into play: if the cheque is honoured, it is as if B performed to C (i.e. it is as if the cheque was cash). If, on the other hand, the cheque is not honoured (i.e. A does not give any money to C), the debt is not discharged, and C may sue B for breach of contract, or C may sue B on the cheque itself, as it is a liquid document. In other words, the fiction does not operate, and B will not be regarded as having himself performed to C. Unless and until

⁵⁰⁷ Cf Chapter Two above.

⁵⁰⁸ Cowen (1983) 16 *CILSA* 1 at 23.

⁵⁰⁹ Does the cheque nevertheless represent an asset in the hands of the payee? It does not usually confer on the payee any claim against the bank, as the bank is under no legal obligation to the payee to honour the cheque. It could be said to be an asset, however, in that it is a liquid document that entitles the payee to sue the drawer if it is not honoured.

⁵¹⁰ And may never receive the money.

⁵¹¹ Cf the discussion, at p 37 in Chapter One, of the German notion of a *Leistung erfüllungshalber*.

the bank honours the cheque, payment by cheque is conditional, and thus does not seem to fall into category (a). If it is later honoured, it becomes unconditional, and then, at least fictionally, it would retrospectively fall into category (a).

Alternatively, one can argue that a bank's paying a cheque does not fall into any of these categories, but that there is another category of cases in which a third party's act can extinguish B's obligation to C. As suggested in the first part of this chapter, there should be a fourth category (d), namely that B's debt to C can be extinguished if B unilaterally 'delegates' the performance he owes to C to a third party A (who may in turn owe a performance to B), without necessarily appointing that person as his agent.⁵¹² In other words, B can authorise A to make his (B's) performance to C. If the relationships between A and B, on the one hand, and B and C, on the other, are valid,⁵¹³ the bank's handing over of the money to C would simultaneously constitute two performances:⁵¹⁴ the performance of A's duty to B, and the performance of B's duty to C (and it would accordingly discharge these two duties). The *causae* for these performances are accordingly the contracts between A and B, and B and C.⁵¹⁵ This last statement has several implications.

First of all, where A hands money to C in accordance with B's instruction and all the underlying contractual relationships are valid, A's handing the money to C cannot be seen as having been unowed, even though A has no obligation vis-à-vis C. A owed the performance, not to C, but to B. The money was owed to C, not by A, but by B.

Secondly, each of the performances and its counter-performances, if any, must be seen in the context of the contractual relationship that constitutes the *causa* for such performance(s). If, for example, B hands C a cheque and C delivers goods in exchange

⁵¹² See Honoré 1958 *Acta Juridica* 135 at 138, where he suggests that, in Roman law, one could perform by appointing a delegate.

⁵¹³ In other words, B validly owes payment to C, A and B have a valid banker-client contract, and B has validly instructed A to perform to C.

⁵¹⁴ See the discussion of 'performance' in Chapter One at p 31 ff above.

⁵¹⁵ The reason for the deflection of A's performance (i.e. so that the money is handed to C rather than B) is B's instruction (in the form of a cheque) to his debtor to give the money to his creditor. I think that such reason cannot, on its own, constitute a *causa*, as it would be meaningless were there not to be an underlying contract between the parties.

(in terms of a contract of sale), the handing over of the cheque by B and delivery of the goods by C must be seen as performance and counter-performance. C's delivery cannot be seen as the counter-performance to a third party (A) (even though the money was received from A).

To use a slightly ridiculous analogy, imagine that Craig makes lamps and sells them at a craft market. Bill admires the lamps and says that he would like a black one. Craig does not have a black one at his stall but says that he has some at home. The rather foolhardy Bill agrees to buy one and sends Craig R1 000 cash by courier, Alan. Upon receipt of the money, Craig delivers a black lamp to Bill's house. Craig's delivery of the lamp must be seen as the counter-performance to Bill's payment of the money and it cannot be seen as counter-performance vis-à-vis Alan, who actually handed the money to him.

Another hypothetical example illustrates the same point: Belinda lends R2 500 to her sister, Anne, to be repaid on 30 August. In the last week of August, Belinda has wall-to-wall carpets installed by Comfy Carpets CC. In terms of their contract, Belinda agrees to pay R2 500 to Comfy Carpets by 30 August. On 30 August, Belinda tells Anne not to give her the money directly, but rather to hand it to Comfy Carpets. When Anne hands over the money, she must be seen as performing her obligation under the loan (i.e. the loan of the money and the repayment thereof are performance and counter-performance). It is as if Belinda has said to her 'you can discharge your obligation to me by giving the money to Comfy Carpets'. Similarly Belinda's successful redirection of the money to Comfy Carpets must be seen as performance of her obligation in terms of their contract (i.e. the installation of the carpets and payment of R2 500 are performance and counter-performance). Anne's handing over the money, and Comfy Carpets installation of the carpets cannot be seen as performance and corresponding counter-performance.

Against this background, what happens when B hands C a cheque, countermands it, C presents it and the bank gives the relevant amount to C? In other words, when a

bank pays in contravention of a countermand (i.e. without authorisation), does such payment discharge B's obligation to C? Does such a payment discharge B's obligation on one of the grounds mentioned above, does it discharge B's obligation to C on some other ground, or does it fail to discharge B's obligation to C? In *Govender's* case, it was held to discharge the obligation B–C, whereas the opposite was held by the Transvaal court in *B & H Engineering*.

Clearly, in such circumstances, the bank does not perform in terms of B's obligation to C as a third party acting without authorisation (in the sense envisaged in Chapter Two above i.e. the Pothier rule, or the rule in *Froman v Robertson*). Nor was the bank authorised (whether contractually or by way of *delegatio solvendi*) to make the payment on B's behalf.⁵¹⁶ The question⁵¹⁷ is then whether the bank's payment nevertheless legally constitutes B's own performance to C in that his conditional performance was rendered final by the bank's unauthorised payment, or whether there is some other legal basis for the extinction of B's obligation to C by a countermanded payment.

B & H Engineering v First National Bank of South Africa Ltd⁵¹⁸

This was essentially the question considered by the Appellate Division when B & H Engineering appealed against the decision of the Transvaal Provincial Division. After recounting the facts,⁵¹⁹ the higher court agreed that the appropriate enrichment remedy in these circumstances would be the *condictio sine causa specialis*⁵²⁰ and, rather than

⁵¹⁶ In other words, A's handing over of the money to C does not legally constitute B's performance to C.

⁵¹⁷ What if we think of an analogous situation, which does not concern a cheque? I give my creditor a letter instructing my debtor to pay my creditor. Then I withdraw that instruction but my creditor hands over the letter and my debtor pays my creditor anyway. In making the payment the debtor is not acting as my agent, or in terms of my *Anweisung*. Whether his payment would discharge my obligation to my creditor in terms of the rules in Chapter Two would depend on the circumstances and on my debtor's intention in making the payment. If one assumes that he did not intend to extinguish my obligation, on what other ground would that obligation be extinguished?

⁵¹⁸ *Supra*.

⁵¹⁹ See the judgment at 284D–F.

⁵²⁰ And not the *condictio indebiti* because the mistaken belief of the paying party concerned, not the existence or otherwise of a debt to the payee, but the existence of a mandate from the drawer: see the judgment at 284H. (The court did not refer to the view of D P Visser in this regard.) Also see

attempting to outline the scope of this remedy, this court also decided the matter on the basis that all that had to be proven was that B & H was enriched 'by receiving payment of the cheque' and that such enrichment was *sine causa*.⁵²¹

Regarding the issue of enrichment, the court (per E M Grosskopf JA,⁵²² the same judge who delivered the judgment in *Jaffer's* case)⁵²³ correctly identified the main question as whether or not Sapco's debt to B & H had been discharged by the cheque payment.⁵²⁴ If the debt had been extinguished by this payment, said the court,⁵²⁵ then B & H would have lost its right to claim payment from Sapco, its net position would not be affected and it would accordingly not be enriched. If, on the other hand, the debt had *not* been discharged by the payment, then B & H would have acquired the amount of the cheque payment and also retain its claim against Sapco, its net assets would have increased, and it would thus *prima facie* be enriched.⁵²⁶

The crucial question, therefore, was whether the handing over of money by a bank in contravention of a countermand serves to discharge the debt of its client. The court answered this question by examining the contractual relationship between Sapco and B & H, and the legal effect of payment by cheque.⁵²⁷

The view of the court was that when someone pays by cheque, he usually intends such payment to discharge the debt, and not novate it.⁵²⁸ According to the court, our law holds that delivery of the cheque itself, and not the bank's subsequent transfer of the money, constitutes payment of the original debt but that this payment is conditional upon the cheque's being honoured.⁵²⁹ The court thus held that when the payee receives

the judgment at 285B regarding the distinction between the *condictio sine causa generalis* and the *condictio sine causa specialis*.

⁵²¹ 285C.

⁵²² Botha, F W Grosskopf, Smalberger and Van den Heever JJA concurring.

⁵²³ *Supra*.

⁵²⁴ At 285F.

⁵²⁵ At 285D.

⁵²⁶ See the judgment at 285E.

⁵²⁷ See 285F and 286H.

⁵²⁸ At 285I.

⁵²⁹ At 286B, following English law: 286C-F.

his money from the bank, 'the purpose of the agreement to accept a cheque has been achieved.'⁵³⁰ The court then posed the question why it should 'matter, as between debtor and creditor, what the arrangements were between the bank and the debtor, and whether the bank has complied with these arrangements?'⁵³¹

In answering this question, the court considered what it called 'the debt-extinguishing agreement' concluded by the parties⁵³² (at least impliedly) when a creditor accepts payment by cheque rather than by cash.⁵³³ This agreement is that payment by cheque is accepted on condition that the bank subsequently pays or honours the cheque.⁵³⁴ When the bank does so, the condition falls away and payment is deemed to have taken place on the date of delivery of the cheque (and not on date of the bank's payment).⁵³⁵ If, on the other hand, the cheque is dishonoured, the original debt would not be discharged.⁵³⁶ The payee (creditor) could then choose to enforce this debt or to sue on the cheque itself. The payee 'would normally sue on the cheque, which would provide him with procedural and other advantages.'⁵³⁷

Counsel for the bank argued that the condition involved in the debt-extinguishing agreement relates to the bank's obeying its customer's order to pay, and this order must accordingly be in existence at the time of payment. 'In other words, payment by the bank would only satisfy the condition if such payment was, at the time of payment, authorised by the debtor (drawer).'⁵³⁸ If, as in the present case, there was a countermand before payment,⁵³⁹ the condition could accordingly not be satisfied, and payment by the bank could not extinguish the original debt'.⁵⁴⁰ The court said that this would effectively mean that 'the agreement between the debtor (drawer) and the bank is

⁵³⁰ See 286I.

⁵³¹ 286I.

⁵³² In other words, the debtor/drawer and the creditor/payee.

⁵³³ See the judgment at 287A.

⁵³⁴ 286B and 287A-B.

⁵³⁵ See the judgment at 286B-C. In other words, the delivery of the cheque itself, and not the bank's transfer of the money, constitutes payment of the original debt: see 286B.

⁵³⁶ 287B.

⁵³⁷ 286A.

⁵³⁸ Cf the argument of Sinclair and Visser 1984 *ASSAL* 377 discussed above at p 229.

⁵³⁹ In other words, payment by the bank.

⁵⁴⁰ See the judgment at 287B.

superimposed on the debt-extinguishing agreement between the debtor and the creditor'.⁵⁴¹ The drawer's debt to the payee would accordingly only be discharged where the bank was entitled to make the payment in terms of its relationship with its client.⁵⁴²

The court rejected this argument and held that when a cheque is paid⁵⁴³ by a bank, the drawer's debt to the payee is discharged, whether or not the bank was acting within a mandate given by its client.⁵⁴⁴ In coming to this conclusion, the court first examined the interests of the payee.⁵⁴⁵ It stated that if one accepted the bank's argument, the payee's risk would be increased. He would not only bear the risk that the bank might not pay,⁵⁴⁶ but would also bear the risk that the bank might pay without having been authorised to do so.⁵⁴⁷ Secondly, the court was of the view that the payee should not be 'drawn into' the matters between the drawer and his bank.⁵⁴⁸ The court said that the payee is not aware of the arrangements between the drawer and the bank, and should not have to bear the risk that there might be a dispute between those parties.⁵⁴⁹ Thirdly, said the court, if it were accepted that only an authorised payment by the drawer would extinguish the debt to the payee, the payee would be in a worse position than if the cheque were dishonoured: he would have parted with the document and would therefore not have the chance to sue on the cheque itself, as he would in the case of dishonour,⁵⁵⁰ and would have to fall back on his contractual claim against the drawer.⁵⁵¹ Fourthly, the court took this point even further, holding that not only would the payee have to fall back on his main claim against the drawer because he no longer physically possessed the cheque, but that the cheque itself would also have been

⁵⁴¹ 287C.

⁵⁴² At 287C.

⁵⁴³ Or 'honoured'; the court did not accept that there was any significant distinction between these words: see 286F-G.

⁵⁴⁴ 289E.

⁵⁴⁵ See the judgment at 287 ff.

⁵⁴⁶ In the court's view, while the risk that a cheque might be dishonoured was inherent in the nature of payment by cheque, the risk that a cheque might be paid without authority was not.

⁵⁴⁷ See the judgment at 287F.

⁵⁴⁸ See 287G-H.

⁵⁴⁹ Together with the attendant uncertainty and delays: 287H-I.

⁵⁵⁰ In which case the bank would return the document to the payee, telling the payee to 'refer to drawer'.

⁵⁵¹ 287I-288A.

discharged by the bank's payment in due course.⁵⁵² In other words, the payee not only parts with the document but also with the rights under the cheque.⁵⁵³ The payee would thus lose the advantages conferred by the cheque's nature as a liquid document.⁵⁵⁴

The court was convinced that accepting the bank's argument would thus upset the balance of the interests of the relevant parties afforded by the general rules regarding cheque payments. It explained that when a payee agrees to accept payment by cheque (rather than insisting on a cash payment), he runs the risk that the cheque might not be honoured.⁵⁵⁵ This risk is counterbalanced, to some extent, by the fact that his possession of the cheque affords him a second source of liability in that the cheque constitutes a liquid document. This means that he can choose to enforce the main debt or to sue on the cheque itself. If payment by cheque were not to have the effect of discharging the drawer's debt to the payee, the payee would lose this advantage of being able to sue on the liquid document. There would accordingly be no counterweight to the risk inherent in accepting payment by cheque rather than insisting on a cash payment. According to the court, '[i]t would be contrary to the very essence of such a debt-extinguishing agreement if circumstances could arise in which the payee loses the benefit of his liquid document before his debt has been paid.'⁵⁵⁶ It accordingly held that 'it is highly desirable from the payee's point of view that his debt be regarded as paid when he receives the money from the bank, whether payment was authorised by the drawer or

⁵⁵² The bank argued that, upon countermand, the cheque no longer constituted an order to pay, within the meaning of the law of negotiable instruments, but that it became an order not to pay. The court disagreed. It held that countermand did not alter the cheque as a document and that it would remain a bill of exchange, notwithstanding the countermand. The court found that countermand only changed the rights between the drawer and drawee in that countermand dispensed with the need for notice of dishonour: when a cheque is countermanded, it need not be presented but if it is, it will be dishonoured and no notice of such dishonour is necessary. In coming to this conclusion, the court rejected the views expressed in the English cases of *Cocks v Masterman* (1829) 9 B & C 902 [1824-34] All ER Rep 431 (KB) and *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another supra* as irrelevant: see the judgment at 288-289E.

⁵⁵³ In other words, both the underlying debt B-C and the cheque are discharged by the bank's payment.

⁵⁵⁴ See the judgment at 291C-F.

⁵⁵⁵ In other words, 'he has sacrificed the certainty of cash for the uncertainty and delay of a cheque': see the judgment at 287D-E.

⁵⁵⁶ See 291C.

not.⁵⁵⁷

The court also considered the interests of the bank.⁵⁵⁸ Grosskopf JA pointed out that, in terms of the relationship between the bank and its client, the bank was not entitled to pay the cheque for it had 'no proper authority' to make the payment.⁵⁵⁹ It therefore had no *contractual* right to repayment by its client or anyone else.⁵⁶⁰ 'This results from its own default and does not seem unfair', said the court.⁵⁶¹ The court went on, however, to suggest (*obiter*) that the bank would 'usually have a claim based on unjustified enrichment *against either the drawer or the payee*.'⁵⁶² Later in the judgment, however, the court expressed the opinion that the bank had no claim against the payee in these circumstances,⁵⁶³ but that the bank would in principle be entitled to sue the drawer (Sapco) on the grounds that the bank's payment to the payee's creditor (B & H) had discharged its obligation to B & H and had therefore unjustifiably enriched the drawer.⁵⁶⁴ The court referred to the suggestion of Stassen and Oelofse that the appropriate remedy in such circumstances would be the *actio quasi negotiorum gestio*.⁵⁶⁵ Without deciding whether the rules of this remedy would be 'strictly and literally applicable to facts such as the present', the court said (also *obiter*) that even if they were not, 'this case is so closely analogous, and the need for equitable relief so clamant, that an action on the grounds of unjustified enrichment should lie....'⁵⁶⁶ The judge went on to say that this would not necessarily imply that the bank would always be able to claim the total amount it had given the payee.⁵⁶⁷

Enrichment is always a matter of fact. Thus a bank might have paid a debt which was on the point of being prescribed, or it might have paid while the parties were negotiating to reduce the debt, etc. Moreover, in exceptional

⁵⁵⁷ See the judgment at 291F.

⁵⁵⁸ At 291I-292A.

⁵⁵⁹ See the judgment at 284F and 291I.

⁵⁶⁰ See 291I. It was accordingly not entitled to debit Sapco's account in the relevant amount.

⁵⁶¹ At 292A.

⁵⁶² 293A. (My emphasis.) Also see 295A.

⁵⁶³ Meaning, presumably, a situation where B in fact owed a debt to C. As the court points out later, the situation would be different if B did not owe anything to C.

⁵⁶⁴ 295A-B.

⁵⁶⁵ At 295B. See Stassen and Oelofse 1983 *Modern Business Law* 137 at 145. The latter author was, incidentally, one of the advocates representing B & H Engineering in this case.

⁵⁶⁶ 295C-D.

⁵⁶⁷ 295D-E.

circumstances the drawer may have an interest in not having the debt paid. In such cases a court may conceivably hold that, even if the drawer were enriched, the bank would not in equity be entitled to restitution.⁵⁶⁸

As the court did not consider this to be one of those exceptional cases, it expressed the view that the bank had a *prima facie* case against Sapco 'because the payment to the payee has discharged the underlying debt'.⁵⁶⁹ It pointed out, however, that the bank's position would be different if the payee had no valid claim against the drawer. 'A bank is consequently in the difficult position that it may not know which of the drawer or payee has been enriched until it ascertains the facts concerning their circumstances and, in particular, their relationship.'⁵⁷⁰ The court therefore suggested that the drawer and payee should be sued as co-defendants in difficult cases.⁵⁷¹

Regarding the interests of the drawer/debtor, the court said that, assuming that the drawer indeed owes a debt to the payee,⁵⁷² and pays by cheque, he concludes a binding 'debt-extinguishing agreement'. This agreement amounts to a contract.⁵⁷³ Stopping the cheque constitutes an attempt 'unlawfully and unilaterally ... to frustrate the debt-extinguishing agreement.'⁵⁷⁴ If the bank obeys the countermand, the agreement will accordingly have been breached. Should the bank pay the debt notwithstanding the countermand, however, there will have been performance in terms of the debt-extinguishing agreement despite the drawer's attempt to breach the agreement.⁵⁷⁵ The judge repeated that, in such a case, '[t]he debt-extinguishing agreement achieved its purpose. The creditor (payee) received his money. There is no need or justification in my view for the law to discountenance this result.'⁵⁷⁶

The court accordingly rejected the bank's main argument viz that the condition in the debt-extinguishing agreement can only be fulfilled by payment in accordance with

⁵⁶⁸ See 295E.
⁵⁶⁹ At 295G.
⁵⁷⁰ 295G.
⁵⁷¹ At 295H.
⁵⁷² See the judgment at 291G.
⁵⁷³ 291H.
⁵⁷⁴ See 291H-I.
⁵⁷⁵ 291H.
⁵⁷⁶ At 291I.

an authorisation of the drawer that existed at the time of payment.⁵⁷⁷ It also rejected the argument that this case fell within the scope of what it called the 'Pothier argument',⁵⁷⁸ in other words, that this was an instance of a third party paying the debt of another. The court held that '[i]n our case the debtor is paying his own debt through the instrumentality of the bank.'⁵⁷⁹ Its reasoning ran as follows:

It is common cause on both sides of the controversy that the bank is not the drawer's agent, but a neutral payment functionary. It is consequently correct that the acts and intent of the bank, by themselves, cannot result in the payment of the debt owed to the payee. However, the acts and intent of the bank form only a part of the picture. They must be seen in the light of the debt-extinguishing agreement between the debtor and creditor. It is that agreement which defines the purpose for which the cheque is given, and for which payment is to be received from the bank. If that agreement provides that any payment by the bank, even an unauthorised one, would discharge the debt as between debtor and creditor, such an agreement would be valid *inter partes*. The fact that the bank does not know or care what the purpose of its payment is does not matter. Its function is neutral, almost mechanical. It performs the act which the parties have agreed would serve to complete the payment of the debt.⁵⁸⁰

In conclusion, the court held that as the bank's payment had extinguished Sapco's debt to B & H, the latter had not been enriched and the bank's enrichment action should accordingly have failed.⁵⁸¹ B & H's appeal was thus allowed.⁵⁸²

Analysis

Two issues were dealt with by the court in this case. The first concerned discharge of obligations and the second the implications thereof for the law of unjustified

⁵⁷⁷ At 292C-E. Refer to the judgment at 286J-287B for a fuller version of the bank's argument.

⁵⁷⁸ Which the court stated thus (at 293A-B): 'Where a bank pays a cheque in the face of a countermand it acts without the authority of the drawer. If it pays a creditor of the drawer's, it consequently does not do so as the drawer's agent. Neither does the bank purport to pay the specific debt in the name of the debtor (the drawer). The bank is a neutral payment functionary. It does not even know for what reason the cheque was given to the payee.... The payment by the bank therefore cannot serve to discharge the underlying debt.' It cited the following as supporters of this argument: Cowen (1983) 16 *CILSA* 1 at 37 and Sinclair and Visser 1984 *ASSAL* 377 at 385. In rejecting the argument, on the other hand, the court referred to Stassen 1980 *Modern Business Law* 77 at 82, *idem* 1985 *Modern Business Law* 15 at 17 and Stassen and Oelofse 1983 *Modern Business Law* 137 at 140.

⁵⁷⁹ At 293G.

⁵⁸⁰ 293E-G.

⁵⁸¹ 294I-295A.

⁵⁸² 295H-I.

enrichment. Each of these will now be evaluated.

Discharge of obligations

As said above, the court's decision that a bank's payment of a countermanded cheque discharges the drawer's debt to the payee was, to a large extent, the outcome of weighing up the relative interests of the parties.⁵⁸³ The judgment is commendable in that it explicitly sets out the underlying policies that influenced the court's decision. Several aspects of this interests-based analysis have met with criticism, however.

Like the German courts, our court gave most weight to the interests of the payee.⁵⁸⁴ Concerns have been expressed about the court's view that the payee should not have to bear the risk that the cheque might be paid in contravention of a countermand. Pretorius thus argues that the payee would not be greatly prejudiced by carrying this risk because he would still be able to enforce his contractual rights against the drawer/debtor.⁵⁸⁵ In support of his opinion that the payee should bear this risk, he also says that the payee carries other risks anyway.⁵⁸⁶ With respect, I find this particular argument unconvincing – the court is not suggesting that the payee should not carry any risk at all, but that it does not want to place an additional risk on the payee, as this would upset the balance between the interests of the parties that the law seeks to maintain.

Another of Pretorius's points, however, is more compelling. He says that the payee should bear this risk because '[i]n most instances cheques are countermanded because of some or other contractual dispute between the parties and very often, as a result of this, the payee is either informed by the drawer that the cheque has been countermanded or he reasonably should foresee in the circumstances that the cheque will be countermanded.'⁵⁸⁷ This raises the distinction made by German lawyers between

⁵⁸³ Cf the German approach above.

⁵⁸⁴ This accords with the approach of other areas of German law, which tends to protect the interests of *bona fide* third parties e.g transfer of ownership.

⁵⁸⁵ Pretorius (1995) 58 *THRHR* 733 at 738.

⁵⁸⁶ Pretorius (1995) 58 *THRHR* 733 at 738.

⁵⁸⁷ Pretorius (1995) 58 *THRHR* 733 at 738. He adds that should the payee be unaware of his enrichment and such 'belief is reasonable in the circumstances', he would only be liable to the extent to which he was actually enriched i.e he would not be liable for any lost enrichment.

cases where the payee is aware of the countermand and those where he is not. I agree that the payee who banks a cheque with the knowledge that it has been countermanded should forfeit the protection otherwise provided by the law. It should be borne in mind that neither of the modern cases dealing with payment of countermanded cheques (*Govender*⁵⁸⁸ and *B & H Engineering*)⁵⁸⁹ concerned a payee who knew of the countermand. The question of awareness is not raised by the writers,⁵⁹⁰ who generally refer to *Roorda*'s and the other cases as being of the same mould, and this seems also to be the approach of the courts. For example, Preiss J, delivering the TPD's decision in *B & H Engineering*,⁵⁹¹ does not seem to attach any special significance to the fact that the payee in this case was unaware of the countermand.⁵⁹² There are convincing reasons for distinguishing a case of a *mala fide* payee from cases such as *B & H Engineering*, and it is hoped that a court faced with such a matter would take this into account.

Another aspect of the judgment that has been criticised is the court's view that the payee should not be detrimentally affected by defects in the relationship between the debtor and his bank (B-A). It has been argued, for example, that the contract between B and C is the *causa* for the 'cambial obligation (derived from the delivery of the cheque)' and that, because the latter cannot exist in a vacuum, 'this inescapable link between these two obligations implicates the creditor to a far greater extent in the arrangements between the debtor and his bank ... than the court was willing to accept.'⁵⁹³ Similarly, Van Zyl argues that when B and C agree on payment by cheque, the bank is necessarily involved, particularly when the underlying agreement B-C is breached by the countermand.⁵⁹⁴

⁵⁸⁸ *Supra*.

⁵⁸⁹ *Supra*.

⁵⁹⁰ Stassen 1985 *Modern Business Law* 15 at 15, Sinclair and Visser 1984 *ASSAL* 377 at 384.

⁵⁹¹ *Supra*.

⁵⁹² For instance, in referring to *Roorda*'s case *supra*, he does not mention that the payee was aware of the countermand, and just mentions the ignorance of the payee in *Govender*'s case *supra* in passing: see his recital of the facts of that case at 44F-G.

⁵⁹³ Pretorius (1995) 58 *THRHR* 733 at 737. Cf Malan and Pretorius *Bills of Exchange* 18, where the authors say, on the one hand, that the underlying contract is the *causa* for the cambial obligation but, on the other, that the cambial obligation is 'abstract'. Also see Visser 1994 *ASSAL* 217 at 221 where he suggests that the court made this decision based on commercial convenience but may have been 'overstating the commercial convenience of its own approach'.

⁵⁹⁴ See Van Zyl 1998 *TSAR* 177 at 195: 'the bank of necessity becomes involved and its mandate

There is merit in these arguments, particularly as far as payees who are aware of the countermand are concerned, but it should again be borne in mind that this case concerned a *bona fide* payee (who was accordingly unaware of the countermand, let alone any possible dispute between the drawer and his bank). Unlike a situation where a cheque has not been properly completed, or where a signature has been forged etc, there is nothing on the face of the cheque to indicate that it has been countermanded.⁵⁹⁵ Provided that the drawer has not informed the payee of the countermand (or where he should reasonably have foreseen that it has been countermanded), the payee deposits the cheque in good faith. The bank does not have to – and should not – pay this cheque but if it does, why should the payee suddenly be asked by the bank to repay the money? As far as the payee is concerned, he has received payment from his debtor, and this cheque has been honoured by the bank, as normally happens. The court effectively opted for protection of the *bona fide* payee's reliance interest, over the rather technical objections outlined in the previous paragraph. Again, the court may take a different view when faced with a *mala fide* payee.

Another thread running through the judgment of the court is commercial convenience. While it has been suggested that the court may have overstated commercial convenience⁵⁹⁶ in relation to the interests of the payee, one should look at this issue from a broader perspective. The effect of the court's finding that the drawer's debt was discharged by the payment in question is to say that payment by cheque in

comes into operation.... If the drawer should decide to breach its obligation towards the payee by stopping payment for whatever reason, good or bad, the payee cannot compel the bank to disregard the countermand and to honour the cheque in order to have payment effected in spite of the drawer's decision no longer to perform. The "arrangements" between the drawer and the bank are, therefore, particularly relevant in the context of the parties' decision to make use of payment by cheque for purposes of effecting performance by the drawer of his obligations in terms of the underlying agreement.' The author adds that 'the countermand as such is an unambiguous indication of the drawer's intention no longer to make performance to the payee and hence to breach the underlying agreement. It cannot simply be ignored.' The author's point that 'payee cannot compel the bank to disregard the countermand...' is confusing, as it lends support to the court's view that the relationship A-B is no concern of C's, rather than the author's argument to the contrary.

⁵⁹⁵ It may be asked whether the judgment opens the door for the defence that a cheque is 'valid on the face of it'.

⁵⁹⁶ Visser 1994 *ASSAL* 217 at 221.

such circumstances is final.⁵⁹⁷ Of course there is always a danger that a cheque might be dishonoured (eg for forgery or lack of funds or because the bank is heeding a countermand) but the court is effectively saying that apart from these unavoidable or inherent risks, a cheque is practically equivalent to cash.⁵⁹⁸ In other words, the court declined to increase the already-existing practical differences between cheques and cash payments. It could even be argued that the effect of this judgment is ultimately in the bank's favour in that it does not further discourage the use of cheques (by imposing on a payee the risk that he would have to disgorge funds handed over by a bank in contravention of a countermand) and thus encourage cash payments or the reliance on credit. Both cash and credit⁵⁹⁹ involve risks that the bank has to insure against, so I am not convinced by the argument that this judgment effectively increases the bank's insurance costs (which would then be passed on to the bank's customers).

As far as policy is concerned, I therefore agree with the approach of the court, with the caveat that *mala fide* payees should not be afforded as much protection as *bona fide* payees. Another aspect of the court's judgment, however, presents a difficulty not of policy but of principle.

The court held that the bank does not pay as a third party in such circumstances. In other words, it correctly distinguished this situation from that treated in the previous chapter, on the grounds that the bank does not intend to perform the obligation of another, but to discharge its own obligation to its client. Neither does the bank act as the drawer's agent in such circumstances, said the court. I think that this conclusion is also correct, because neither the bank nor its customer intend to create a relationship of agency (whether the cheque was countermanded or not).⁶⁰⁰

What other grounds for extinction are there? Either B must have made the

⁵⁹⁷ Once the payee receives the money from the bank.

⁵⁹⁸ Cf the origins of paper money, which originally represented a promise by the reserve bank to pay an equivalent amount of gold to the bearer.

⁵⁹⁹ E g handling and transporting cash is expensive and risky, especially in view of the high crime rate in South Africa.

⁶⁰⁰ E g when the customer writes a cheque, the bank might never receive it (i e no consensus).

performance himself, or the court must have created a further category.⁶⁰¹ The court held that the bank acted as a 'neutral functionary' in this situation. This presents at least one difficulty. The expression 'neutral functionary' suggests that the bank merely acted as a channel for the act or intention of its customer.⁶⁰² In other words, it implies that the bank did not 'exercise its mind' in making the payment, that it did not act of its own accord (i.e. that it had no discretion in the matter, and that it just obeyed orders). With respect, while I can accept the argument that someone acting under orders might act as 'neutral functionary', I find the notion that someone can act as a neutral functionary in *disobeying* orders somewhat peculiar.

What is perhaps more important for present purposes, however, is that the court implies that the act of the bank (payment) can legally be seen as the act of its customer (i.e. that, by way of a legal fiction, B made the performance himself). This resembles a relationship of agency, as far as the consequences are concerned, but the court clearly said that the bank did not act as its client's agent. The court accordingly seems to have created (or identified) an additional means of settling a debt. The notion of *delegatio solvendi* provides a means of explaining this: by way of the legal fiction first conceived by an ancient Roman lawyer,⁶⁰³ A's act of performance to C is not only regarded as its own performance to B; the same act is attributed to B and is thus regarded as B's performance to C.

Unjustified enrichment

Regarding the question of enrichment in this context,⁶⁰⁴ the court clarified a number of issues. First, the court held (*obiter*) that if the debt B–C is not extinguished by a payment A–C, then C will be enriched and A can sue C directly with a *condictio sine causa*, thus settling the long-standing debate as to the appropriate remedy to be used in such circumstances.

⁶⁰¹ See the discussion at p 243 above.

⁶⁰² In other words, like a 'conduit pipe' – see D P Visser 'Unjust enrichment' 2000 *ASSAL* 273 at 276, where the author uses the expressions 'neutral functionary' and 'conduit pipe' as synonyms. ⁶⁰³ Celsus: see note 84 above.

⁶⁰⁴ It is artificial to separate the court's interests-analysis regarding the enrichment and settlement of debt issues as the analysis straddles both.

Secondly, the court confirmed that if a debt B–C is discharged by a payment A–C, C is not enriched because the loss of his claim (against B) and the acquisition of the money cancel each other out. Although the court did not deal with this question explicitly, it implied that, in these circumstances, B could not bring a *condictio indebiti* (and maybe none of the other *condictiones* either) against C, because the purpose of the debt-extinguishing agreement between B and C had achieved its purpose if the payment had extinguished B's debt to C. Another way of putting this is that there is no place for an enrichment claim between B and C because they are linked by a valid obligation B–C and any performance by B to C is therefore justified.

More importantly, the court held (*obiter*) that where a debt B–C is extinguished by A's 'payment' to C, A can in principle sue B for enrichment with the *actio quasi negotiorum gestorum*, unless B's debt to C was about to prescribe etc. I think that it is correct that B would have been enriched at the expense of A if B's debt to C was extinguished. But would the *actio quasi negotiorum gestorum* be the appropriate remedy? This is clearly not a situation of true *negotiorum gestio* because the bank was not carrying out the affairs of another; it intended to fulfil its own obligation to B, and not to settle B's debt to C.⁶⁰⁵ It could therefore, at most, be a situation of *quasi negotiorum gestio*. As the bank was managing what it thought were its own affairs (which coincidentally benefitted B), it arguably acted as a *bona fide gestor*. The problem is that the bank clearly acted *domino prohibente*. Although the court did not discuss it in detail, there is authority for the bank to bring an *actio quasi negotiorum gestorum* in analogous circumstances: *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd*.⁶⁰⁶

The facts of *Taylam*'s case will not be recited again here,⁶⁰⁷ but it will be remembered that Taylam instructed his bank to pay certain sums of money to his builders upon presentation of the architect's certificates. Then Taylam told the bank not

⁶⁰⁵ Within the meaning of *Froman v Robertson supra* or the circumstances covered in Chapter Two. 1979 (2) SA 383 (C). Also see the discussion in Chapter Two and at p 180 above.

⁶⁰⁶ For the facts, see pp 384–387 of the judgment and Chapter Two above.

⁶⁰⁷

to pay upon presentation of a certificate and warned the bank that, if it paid, it would be doing so 'at its own peril'.⁶⁰⁸ The bank disregarded Taylam's warning and made the payment because it believed that it was bound to pay. It then claimed this amount from Taylam, on the basis that Taylam was unjustifiably enriched at its expense. The facts of this case are clearly analogous to those in the *Govender* and *B & H Engineering* cases: in all three cases, B instructed A to make a payment to C and then withdrew that instruction, but A paid C nevertheless. The main differences between *Taylam*'s case and the others are that Taylam's instruction to the bank did not take the form of a cheque, the document to be presented to the bank by C (upon which payment was to take place) was not a cheque and, finally, it is not clear whether C was aware that Taylam had withdrawn the instruction to pay.

The court in *Taylam*'s case held that, in principle,⁶⁰⁹ the bank could sue Taylam with an extended *actio negotiorum gestorum*, provided that it could 'prove circumstances that would make it just for it to have acted in contravention of [the *dominus*'s] ... expressed wishes.'⁶¹⁰ The court's proviso was echoed by the Appellate Division in *B & H Engineering* in the strange passage cited above.⁶¹¹ It seems contradictory to state that '[e]nrichment is a matter of fact' and then to suggest that notwithstanding the fact of enrichment, liability might involve an element of discretion on the basis of equity.⁶¹²

It is also perhaps questionable whether the *actio quasi negotiorum gestorum* would be the appropriate remedy in such circumstances. From a purely technical perspective, the *condictio indebiti* seems more fitting in that this was a situation where

⁶⁰⁸ At 386A and 386G of the judgment.

⁶⁰⁹ The case just dealt with an exception on the part of the bank, and it is not clear whether the case ever went to trial – no report of a trial is contained in the *SALR*.

⁶¹⁰ See that judgment at 395C.

⁶¹¹ See p 253 above. For convenience, the passage is repeated here: 'Enrichment is always a matter of fact. Thus a bank might have paid a debt which was on the point of being prescribed, or it might have paid while the parties were negotiating to reduce the debt, etc. Moreover, in exceptional circumstances the drawer may have an interest in not having the debt paid. In such cases a court may conceivably hold that, even if the drawer were enriched, the bank would not in equity be entitled to restitution.'

⁶¹² Cf the criticism of the proviso in *Taylam*'s case cited in Chapter Two at p 125.

someone performed in the mistaken belief that his performance was due: A thought that it was bound to perform to B by honouring its cheque, whereas there was no such obligation as the cheque had been countermanded. The case also seems to fall outside the province of *negotiorum gestio*: the *gestor*, whether *bona* or *mala fide*⁶¹³ or neither, has to administer the affairs of another, and the Appellate Division explicitly held in the *B & H Engineering* case that this is not an instance of performance of another's obligation.⁶¹⁴

What about considerations of policy? Requiring the bank to rely upon the *condictio indebiti* would have the effect of making the bank bear the risk of loss resulting from its own negligence. It has been suggested that the bank's error in such cases would almost always be inexcusable and that the bank would therefore effectively be without a remedy. Consequently, it is argued, the banks would have to insure themselves against this loss, and the cost of the increased premiums would ultimately devolve upon the banks' customers. On the other hand, it could be argued that there could indeed be circumstances where the bank might be able to show that its error was excusable,⁶¹⁵ and that the role of the law of enrichment is not to protect parties from the results of their own negligence. Moreover, the practical consequence might be that banks put procedures in place to ensure that such (rare) negligent mistakes are even less likely to occur.⁶¹⁶

The practical result of allowing the *actio quasi negotiorum gestorum* in such circumstances, on the other hand, is to allow the bank to sidestep the consequences of

⁶¹³ In other words, someone who manages the affairs of another for his own benefit.

⁶¹⁴ Cf the arguments of Niall R and Deon van Zyl 'Unauthorized management of affairs (*negotiorum gestio*)' in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 366 at 394 ff.

⁶¹⁵ E.g. someone draws a cheque on A Bank's Clanwilliam branch, and hands the cheque to a creditor in Clanwilliam. Prior to the bank's payment of the cheque, the drawer then enters A Bank's Pofadder branch and completes a form instructing the bank to stop the cheque. Due to an electricity failure, the Pofadder bank's computer system shuts down and notice of the countermand does not reach the Clanwilliam branch before payment has already occurred. (Cf the facts of *Nedcor Bank Ltd v ABSA Bank and another* 1995 (4) SA 727 (W), discussed below at p 276.) More probably, see the facts of *Taylam's* case, where the bank apparently did not act negligently.

⁶¹⁶ As mentioned above (see e.g. footnote 132), only three such cases have reached the Law Reports over the last hundred years.

its negligence.⁶¹⁷ As pointed out above, the courts have sought to protect the interests of the drawer by stipulating exceptional circumstances in which the bank would not succeed.⁶¹⁸ This is problematic because it requires a decision on the basis of equity,⁶¹⁹ and because it places the onus on the drawer. This shifts the balance too much in favour of the banks, in my opinion. I am accordingly of the view that the appropriate action would be the *condictio indebiti*.

(c) Situations where there was no valid instruction

In this section, cases where A never received a valid *Anweisung*⁶²⁰ will be considered. For example, B purports to instruct A to make a performance to B's creditor, C.⁶²¹ A makes the 'performance' (e.g. payment), unaware that the instruction was defective or absent.⁶²² B could have lacked legal capacity at the time he made the instruction,⁶²³ or he might have signed the cheque under compulsion (*vis absoluta*)⁶²⁴ or he might not have complied with the formal requirements for validity of a cheque.⁶²⁵ Other examples

⁶¹⁷ Bearing in mind, of course, that the law of enrichment is not punitive and its function is not to compensate for harm negligently caused.

⁶¹⁸ In *Taylam's* case at 393A and in *B & H Engineering's* case *supra* at 295E.

⁶¹⁹ Cf the general distaste of the courts for open-ended questions of equity and fairness e.g. the court's rejection of a criterion of unfairness in the law of contract. Cf the discussion at p 128 ff in Chapter Two of ways in which this criterion may be given a more definite content.

⁶²⁰ Either because there was a purported instruction but it was defective, or because there was instruction at all (whether purported or otherwise). These two categories of cases are commonly treated together. See e.g. *Münchener Kommentar/Lieb* § 812 marg note 46; *Medicus Bürgerliches Recht* marg note 677; *Medicus Schuldrecht II* marg note 729; *Loewenheim Bereicherungsrecht* 35 ff.

⁶²¹ Cf *Koppensteiner and Kramer Bereicherung* 31: here we are concerned with cases where the underlying causal relationship (i.e. the underlying banker-client contract) is valid but the *Anweisung* itself is invalid. They point out (also at 31) that the important factor is that there was neither a valid *Anweisung* nor one that can be attributed to B in terms of the rules regarding protection of reliance (*Rechtscheinhaftungsprinzipien*).

⁶²² See, e.g., *Münchener Kommentar/Lieb* § 812 marg note 45: A performs to C in the 'erroneous belief' that there was an *Anweisung*. Otherwise the case would be covered by § 814 BGB. A also does not intend to perform B's obligation to C in terms of § 267: see *Koppensteiner and Kramer Bereicherung* 31.

⁶²³ BGHZ 111, 382; *The Standard Bank of South Africa Ltd v Haskins supra*. Regarding the position of a minor, see *Larenz and Canaris Schuldrecht II/2* 227 ff.

⁶²⁴ *Koppensteiner and Kramer Bereicherung* 31.

⁶²⁵ BGHZ 66, 362 (cheque bore firm's rubber stamp instead of the necessary signature).

include cases where a bank mistakenly carried out the same transfer twice,⁶²⁶ where a bank mistakenly transferred the wrong amount to the correct recipient,⁶²⁷ where a bank mistakenly transferred the correct amount to the wrong recipient,⁶²⁸ and where a bank made a transfer without having been given any instruction by its client at all.⁶²⁹ Or the account-holder's signature might have been forged.⁶³⁰

Thorny questions

Although such cases arise less often than those where there was a valid instruction that was subsequently revoked,⁶³¹ they have generated ample litigation and academic discussion in Germany.⁶³² Two questions in particular have provoked debate. The first is whether A should sue B or whether he would have a direct action against C. In other words, should cases where there is no valid *Anweisung* should be treated in the same way as cases where there is no valid underlying contract between A and B? In short, who should sue whom? The second question is whether the recipient's knowledge or ignorance of the invalidity or absence of an *Anweisung* should play a role in answering the first question. Larenz and Canaris's comment that answering these questions is 'not simple' is an understatement, particularly regarding cases where a fourth party is added to the *dramatis personae* as a forger or thief.⁶³³

The first question was initially answered with reference to the further question whether the *Anweisung* or the underlying contract between A and B provides the *causa* for A's handing over to C. This question is important for a number of reasons, which may be illustrated by the situation of forged cheques. Consider, for example, the facts

⁶²⁶ KG NJW-RR 1992, 816; OLG Hamburg NJW 1983, 1499. See Larenz and Canaris *Schuldrecht II/2* 226.

⁶²⁷ BHG NJW 1987, 185 and *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd supra* (which both concerned overpayments of approximately ten times the instructed amount).

⁶²⁸ BGHZ 66, 372.

⁶²⁹ LG Stuttgart, NJW 1994, 2626. For these and other examples see Loewenheim *Bereicherungsrecht* 35 ff; Larenz and Canaris *Schuldrecht II/2* 226.

⁶³⁰ Koppensteiner and Kramer *Bereicherung* 31. Larenz and Canaris *Schuldrecht II/2* also mention (at 226) the example of a bank carrying out an instruction after the insolvency of the instructing party.

⁶³¹ Medicus *Bürgerliches Recht* marg note 677.

⁶³² See, e.g., *Münchener Kommentar/Lieb* § 812 marg notes 45 ff.

⁶³³ Larenz and Canaris *Schuldrecht II/2* at 227.

which prompted the litigation in the South African case of *First National Bank of Southern Africa Ltd v East Coast Design CC and Others*.⁶³⁴

In this case, a Mr Roux concluded a contract with East Coast Design (C), a firm of interior designers, in terms of which the firm undertook to redecorate his penthouse apartment. Roux paid the non-refundable deposit due under the contract with certain cheques that he had stolen from BP (B) and forged. The cheques were subsequently presented to BP's bankers, First National Bank (A). East Coast Design knew that Roux was not employed by BP, and did not investigate the validity of the cheques.⁶³⁵ The bank honoured the cheques in the knowledge that there was a contract between Roux and East Coast Design. In addition, the bank was cessionary of Roux's rights in terms of this contract, and had informed East Coast Design of the cession.⁶³⁶ There was also no contract between the bank and East Coast Design. At the time when the cheques were drawn, BP did not owe anything to East Coast Design.⁶³⁷

If the *causa* for the bank's payment is to be found in the *Anweisung*, the parties at the points of the triangle would be the bank, Roux (the instructing party), and East Coast Design (the payee).⁶³⁸ If the *causa* for the bank's payment lies in the underlying banker-client contract, on the other hand, the three relevant parties would be the bank, BP and East Coast Design. In the first case, there would be an invalid relationship between the instructing party and A and a valid relationship between the instructing party and C; in the second, there would be a valid relationship B–A, and no relationship at all between B and C. Needless to say, this question of categorisation is unimportant in itself, but as the German writers suggest different solutions for each category of cases, reflecting variations in the interests of the parties, one must be clear as to exactly which cases fall into each category.⁶³⁹

⁶³⁴ *Supra*.

⁶³⁵ 146E–F.

⁶³⁶ See 143C.

⁶³⁷ For the facts, see the judgment from 140F–141F.

⁶³⁸ Of course, there can only be a valid *causa* if the relationship in question – whether it be the *Anweisung* or the underlying contract – is valid.

⁶³⁹ Cf the comments at p 192 ff above.

It should also be borne in mind that the current approach of the majority of German writers and the courts is that cases of multi-party enrichment should be solved – at least partly – by reference to the ‘causal relationships’ between the parties.⁶⁴⁰ It is thus essential that there is clarity as to whether the *Anweisung* or the underlying contract between the parties provides the legal ground for a payment under instruction. As there are two possible ‘causal relationships’ (i.e. between BP and the bank, on the one hand, and between Roux and the bank, on the other), the notion of a ‘causal relationship’ seems to hit the same sort of obstacle that sank the *Leistungsbegriff* (viz that there can potentially be more than one *Leistung* in a particular situation).⁶⁴¹

This question also implies that only a particular *causa*, or particular *causae*, will be relevant in determining whether an enrichment action is permissible or not. In other words, in order to show that something had been acquired ‘without legal ground’, one has to be clear which possible legal ground or grounds have the potential to scupper an enrichment claim. This issue will be discussed further below.

German answers

According to von Caemmerer,⁶⁴² the *Anweisung* itself provided the justification or ‘basis’ (*Geschäftsgrundlage*) for the transaction A–C, and if there were no valid *Anweisung* B–A (and hence no *causa* for the payment to C rather than B), A should have an enrichment claim against C.⁶⁴³

This was disputed by Pfister,⁶⁴⁴ however, who focused on the position of C. He argued that, from C’s point of view, it was no easier to establish whether there was a

⁶⁴⁰ Reflecting the relevant policy factors, and the relative interests of the parties.

⁶⁴¹ This may also have a bearing on the question of enrichment. The SCA’s approach in *B & H Engineering v First National Bank of SA Ltd* suggests that the court regards enrichment as being the most important criterion for identifying the parties to an enrichment action in South African law. In other words, the existence of a claim in the relationship between B and C helps to identify who was enriched, so one must be clear who ‘B’ is: the party who made the purported instruction, or the bank’s client.

⁶⁴² Also see BGHZ 50, 227 (NJW 1968, 1822).

⁶⁴³ See Ernst von Caemmerer *Gesammelte Schriften I* (1969) 328 ff; Koppensteiner and Kramer *Bereicherung* 31.

⁶⁴⁴ B Pfister ‘Zum Bereicherungsanspruch im Dreiecksverhältnis bei Fehlen einer Anweisung’ 1969 *JR* 47.

valid *Anweisung* than whether A and B had a valid underlying relationship and that there was therefore no clear reason why one rather than the other should be treated as the *causa*.⁶⁴⁵ He thus concluded that cases where the *Anweisung* was invalid or absent should be treated in the same way as cases where the underlying contract A–B was defective;⁶⁴⁶ A should thus sue B in such circumstances. He cited commercial convenience⁶⁴⁷ and his view that the balance of the interests of the parties was the same as in cases where there was no valid underlying relationship.

Although Pfister's views attracted some support, Canaris's views won the day. He regards the relevant parties as being the bank, its client and the payee (to use banking terminology). In other words, the causal relationship is the underlying contract between A and B, and not the *Anweisung*, whoever makes it. In analysing the relative interests of the parties, Canaris focused on B's perspective rather than C's.⁶⁴⁸ He argued that the law should not accept that B's debt to C was validly extinguished by A's erroneous payment and that A could sue B for enrichment. To do so, he maintained, would put B at a disadvantage, which was unwarranted seeing that there was no reason why A's 'performance' to C should be attributed to B. He cited, as examples of the kind of disadvantages that B would suffer if he were faced with an enrichment claim, the possibility that C's claim against B might have been about to prescribe,⁶⁴⁹ or that he would lose the possibility of set-off or any rights of retention which he could have raised against the *Rückgriffskondition* that A could bring against him.⁶⁵⁰ The bank would not be greatly disadvantaged by having to sue C rather than B because, had it been allowed to sue B, it would have been in a relatively weak position anyway, because it would only have been able to do so with the *Kondition der Kondition* (i.e. a claim for cession of

⁶⁴⁵ Also see Koppensteiner and Kramer *Bereicherung* 31–32.

⁶⁴⁶ At 49.

⁶⁴⁷ In other words, that the *Anweisungsverkehr* ('*Anweisungs-traffic*') would be disrupted if the effectiveness of payments depended on whether or not there was a valid *Anweisung*.

⁶⁴⁸ Canaris (n 8) 824–5.

⁶⁴⁹ And now he would be faced with an enrichment claim with a thirty year prescription period: see Canaris (n 8) at 825.

⁶⁵⁰ Canaris (n 8) at 824–5. In this regard it should be borne in mind that he would be entitled to the protection drawn, by analogy, from the law of cession: see Larenz and Canaris *Schuldrecht II/2* at 226; Chapter Two at p 129 above; §§ 404 and 406 ff BGB. Larenz and Canaris *loc cit* point out, however, that he should not have to enter into arguments *with the bank* as to the availability of these defences and the existence – or otherwise – of his debt vis-à-vis C.

B's possible claim against C).⁶⁵¹

Following Canaris's lead, the majority of writers⁶⁵² now hold that although the 'causal relationship' lies between A and B,⁶⁵³ A can bring an enrichment action (a *Nichtleistungskondiktion*)⁶⁵⁴ directly against C in the circumstances outlined above.⁶⁵⁵ The currently accepted reasoning behind this is that, without an effective instruction,⁶⁵⁶ the conduct of A cannot be attributed to B.⁶⁵⁷ B should therefore not be affected by the 'unravelling' of the relevant relationships in terms of the law of enrichment:⁶⁵⁸ he should be left out of the picture entirely. In other words, the protection of B takes priority over the protection of any reliance on C's part.⁶⁵⁹ It is considered that C's position is sufficiently protected by the rules concerning loss of enrichment.⁶⁶⁰ The practical results are that C's claim against B would not be extinguished⁶⁶¹ and the bank (A) would have to carry the risk that C might go insolvent⁶⁶² or disappear.

⁶⁵¹ Larenz and Canaris *Schuldrecht II*/2 227. Also see Chapter One above.

⁶⁵² *Münchener Kommentar/Lieb* § 812 marg note 46: 'ganz überwiegend'. See e.g. Medicus *Bürgerliches Recht* marg note 677.

⁶⁵³ See Larenz and Canaris *Schuldrecht II*/2 at 229: it is not correct to call the *Anweisung* itself the legal ground as it does not, on its own, say whether the transferred money was due to the recipient or not. In other words, the *Anweisung* cannot provide C with a ground for retention vis-à-vis A.

⁶⁵⁴ In the form of an *Aufwendungskondiktion*: see p 272 below.

⁶⁵⁵ Medicus *Bürgerliches Recht* marg note 677; Medicus *Schuldrecht II* marg note 729; Loewenheim *Bereicherungsrecht* 37 ff. Köppensteiner and Kramer *Bereicherung* 33; *Münchener Kommentar/Lieb* § 812 marg note 46. In other words, A can sue C directly even if the performance was not gratuitous (and therefore covered by the direct action afforded by § 822 BGB). Regarding the notion of a 'causal relationship', and the conclusion that it lies in the underlying contract between A and B, see Chapter One at p 46 ff and the introductory part of this chapter.

⁶⁵⁶ For it was merely apparent, and therefore not legally relevant: *Münchener Kommentar/Lieb* § 812 marg note 46.

⁶⁵⁷ Whose interests are 'also worthy of protection': Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 34; Larenz and Canaris *Schuldrecht II*/2 226 (i.e. the payment A–C cannot be seen as performance B–C; Canaris (n 8) 820 ff.

⁶⁵⁸ Medicus *Bürgerliches Recht* marg note 677; Medicus *Schuldrecht II* marg note 729.

⁶⁵⁹ In other words, the law does not afford C any protection based on his (possible) belief or reliance: Larenz and Canaris *Schuldrecht II*/2 227; *Münchener Kommentar/Lieb* § 812 marg note 46: 'for this reason [viz the fact that A's conduct is not attributable to B] any protection of legal appearances [*Rechtsscheinschutz*] is excluded.'

⁶⁶⁰ § 818 (3) BGB. See Canaris (n 8) 825–6; Medicus *Bürgerliches Recht* marg note 677.

⁶⁶¹ Larenz and Canaris *Schuldrecht II*/2 226; Köppensteiner and Kramer *Bereicherung* 32: C cannot keep money received in terms of his relationship with B, or raise any defences arising from this relationship against the bank.

⁶⁶² Köppensteiner and Kramer *Bereicherung* 32.

Should it make a difference whether C was aware that A handed over the performance in error (and therefore that it did not represent a performance by B)? Larenz and Canaris say no; they argue that it does not matter whether C knew or ought to have known that there was no valid *Anweisung*, and that the decisive factor is rather that A had not been 'authorised' by B.⁶⁶³

The question of locating the enrichment has also surfaced in this context.⁶⁶⁴ Thus it has been asked whether A's claim against C depends on whether C had a valid claim against B in the *Valutaverhältnis* and whether the debt B–C was extinguished by the payment at issue.⁶⁶⁵ The answer given by writers such as Medicus, Larenz and Canaris is that an apparent performance by A to C should also not be allowed to extinguish any obligation that B might owe C.⁶⁶⁶ In other words, if we deny that there is any link between A and B for the purposes of enrichment, we must also deny that there is any link for the purposes of extinction of B's obligation to C.⁶⁶⁷ Or, as Larenz and Canaris put it, any debt owed by B to C cannot be extinguished without a valid *Tilgungsbestimmung* (i.e. intention to discharge).⁶⁶⁸ They and Medicus thus say that C should pay A back even if he has a claim against B.⁶⁶⁹ Whether or not there is a valid claim in the relationship between B (the bank's client) and C is therefore immaterial.⁶⁷⁰ Cases where, for example, B validly owes money to C and gives him an unsigned cheque as 'payment' would be treated in the same way as cases where, for example, X steals B's cheque book and forges B's signature on a cheque which he then uses to settle his own debt (i.e. X–B): in both cases, the bank may sue the recipient, C. The irrelevance of the existence or absence of a claim B–C surely implies not only that C

⁶⁶³ Who was therefore only apparently an 'instructing party'.

⁶⁶⁴ See, e.g., *Münchener Kommentar/Lieb* § 812 marg notes 45 and 57 ff.

⁶⁶⁵ *Münchener Kommentar/Lieb* § 812 marg note 45.

⁶⁶⁶ Medicus *Bürgerliches Recht* marg note 677; Larenz and Canaris *Schuldrecht II*/2 226 and 228.

⁶⁶⁷ A's performance can also not be regarded as a performance in terms of § 267 BGB (see Chapter Two) because A would not have the necessary intention: he intended to perform to and for B, not to settle B's debt as a third party.

⁶⁶⁸ See Chapter One at pp 34–5

⁶⁶⁹ Medicus *Bürgerliches Recht* marg note 677.

⁶⁷⁰ In other words, cases where there is no *Anweisung* and no valid legal relationship between B and C would not be treated as cases of *Doppelmangel*. As soon as there is a valid underlying contract between A and B, the case will not be one of *Doppelmangel*. The importance of this point is that the majority of German writers suggest a different solution for *Doppelmangel* situations: see section 3 below

cannot argue that he has not been enriched where such a claim *does* exist, but also that he cannot raise a contract between himself and B (or X) as a legal ground which would justify his receipt. Larenz and Canaris also justify their view by pointing out that C should not be forced to engage in arguments with the bank as to whether or not he had a valid claim against B.

After some initial hesitation,⁶⁷¹ the courts have also come to approve of a direct claim A–C.⁶⁷² Numerous examples could be cited.⁶⁷³ In one case,⁶⁷⁴ for instance, B bought a business from C. C, with the collaboration of one of the employees of bank A, forged a document purporting to be an instruction by B to the bank to transfer part of the purchase price to C. In accordance with this apparent instruction of B, A made the transfer to C. B then sued C for the relevant amount. The court said that A's payment to C could not be regarded as a performance by A to B and by B to C, because there had been no valid instruction by B, and C had been aware of this. The court accordingly held that B had not 'performed' to C in the sense required by the law of enrichment, and neither had A to B. It therefore concluded that in such a case A should sue C directly.

Similar reasoning was employed in a case⁶⁷⁵ where B gave X certain blank cheques, drawn on bank A, in respect of building society loans. Instead of filling in the appropriate amounts, X inserted amounts totalling DM 80 000, and sold the cheques to C for cash. C cashed the cheques, X committed suicide and B sued C for DM 80 000.

In yet another case,⁶⁷⁶ however, the court emphasised, not the *Leistungen* involved, but the relative interests of the parties and the protection of reliance.⁶⁷⁷ The

⁶⁷¹ See, e.g., Loewenheim *Bereicherungsrecht* 37.

⁶⁷² See, e.g., BGHZ 66, 362 (where a bank mistakenly paid its client's creditor C in terms of a cheque drawn by its client (a firm B), bearing B's stamp, rather than the appropriate signature. The cheque was thus invalid. The court held that the bank could claim directly from the payee.) (See discussion by Loewenheim *Bereicherungsrecht* at 35).

⁶⁷³ See, e.g., *Münchener Kommentar/Lieb* § 812 marg notes 52 ff; Loewenheim *Bereicherungsrecht* 37 ff.

⁶⁷⁴ BGH NJW 1994, 2357. See Loewenheim *Bereicherungsrecht* 35 for a summary of the facts, and 37-8 for a discussion of the court's reasoning.

⁶⁷⁵ BGH, NJW 1995, 3315.

⁶⁷⁶ BGHZ 66, 362. For discussion of this case see, e.g., Loewenheim *Bereicherungsrecht* 37

⁶⁷⁷ Loewenheim *Bereicherungsrecht* 37.

relevant *Anweisung* in this case also took the form of a cheque, but here it was defective in that bore the stamp of the bank's client, a firm (B), and not the required signature. The cheque was therefore void for non-compliance with the formal requirements for validity.⁶⁷⁸ The bank (A) nevertheless paid the relevant amount upon presentation of the cheque by the recipient (C). A subsequently sued C for this amount. The court held that C did not deserve protection because anyone who consciously cashed an unsigned cheque would also know that the bank would not be allowed to honour it. The court thus said that C should not derive any advantage from the bank's error, and that he had no reliance that warranted protection. Turning to B's position, the court said that the client of a bank, on the other hand, should be entitled to rely on his bank's not honouring an unsigned cheque. If the bank were to do so nevertheless, the court continued, the payment to C would not be attributable to B, who had not caused the ill-fated payment. Because the recipient was aware of the defect in question, the court considered it justifiable that the performance of the bank should not be attributed to its client.⁶⁷⁹

Because this and other early cases all concerned recipients (C) who were aware that there had been no valid instruction,⁶⁸⁰ it was uncertain what the court regarded as decisive: this knowledge,⁶⁸¹ or the distinction between an instruction that was merely defective, and one which was completely absent.⁶⁸² It was thus unclear whether the court was prepared to grant A a direct action against C merely because, from his point of view, A's handing over did not represent a performance (*Leistung*) B–C.⁶⁸³ This implied that, if C were unaware that there was no valid *Anweisung*, A might not be allowed a direct action against C on the grounds that his belief (or reliance) that A's handing over constituted a performance by B might warrant protection.⁶⁸⁴

⁶⁷⁸ Viz Art 1 No 6, Art 2 I ScheckG: see Loewenheim *Bereicherungsrecht* 36.

⁶⁷⁹ See Loewenheim *Bereicherungsrecht* 37.

⁶⁸⁰ In other words, they were not acting in good faith: *Münchener Kommentar/Lieb* § 812 marg note 53.

⁶⁸¹ Medicus *Schuldrecht II* marg note 729: the direct action was at first only given because the payee knew that there was no valid *Anweisung*.

⁶⁸² Medicus *Bürgerliches Recht* marg note 677.

⁶⁸³ *Münchener Kommentar/Lieb* § 812 marg note 53.

⁶⁸⁴ *Münchener Kommentar/Lieb* § 812 marg note 53.

Later cases, however, suggest that the recipient's belief is irrelevant,⁶⁸⁵ and that his reliance will not be protected, even if he is unaware of the absence of a valid *Anweisung*.⁶⁸⁶ The crucial question is now whether the handing over by A to C can be attributed in any way to B.⁶⁸⁷ If it cannot be attributed to B (i.e. where there is no valid *Anweisung*),⁶⁸⁸ the bank can bring an enrichment claim against the payee. The approach of the courts is thus now in line with that of the majority of academics.⁶⁸⁹

As mentioned above, assuming that A is to proceed against C and not B in such circumstances, he must do so with a *Nichtleistungskondition*.⁶⁹⁰ the bank's purpose is not to perform (in the sense required in terms of the *Leistungsbegriff*) to C, but to perform to its client B by carrying out his purported instruction.⁶⁹¹ Or, put differently, there is no performance-relationship between A and C, but merely a factual handover.⁶⁹² As there was no *Leistung* A–C, A's claim against C cannot be a *Leistungskondition*. The particular species of *Nichtleistungskondition* to be used by A is the *Aufwendungskondition*.⁶⁹³ It will be recalled from the discussion in Chapter Two that this is the action afforded to what we would call a *mala fide gestor* (i.e. in cases of the type of *unechte Geschäftsführung ohne Auftrag* called *Geschäftsanmaßung*).⁶⁹⁴

South African law

As said above, cases belonging in this category are those where A (typically, a bank) pays C, without having received any valid instruction from its (A's) contract-partner, B.

⁶⁸⁵ BGHZ 111, 382 at 386. This approach has been followed in subsequent cases such as BGH ZIP 1990, 1126; BGH NJW 2001, 1855; BGH NJW 2001, 2968; OLG Köln ZIP 1996, 1376; OLG Düsseldorf ZIP 2003, 897. See Larenz and Canaris *Schuldrecht II*/2 228 regarding the question of lack of capacity.

⁶⁸⁶ BGHZ 135, 307 at 313 and 315. Also see Larenz and Canaris *Schuldrecht II*/2 228: C's reliance cannot result in A's performance being attributed to B.

⁶⁸⁷ See, e.g., BGHZ 111, 382 at 386.

⁶⁸⁸ See Larenz and Canaris *Schuldrecht II*/2 228: this applies to all cases of 'attributability errors'.

⁶⁸⁹ See, e.g., BGH ZIP 2001, 781 ff.

⁶⁹⁰ Medicus *Bürgerliches Recht* marg note 677; Medicus *Schuldrecht II* marg note 729; Loewenheim *Bereicherungsrecht* 38, 39, 42; Palandt/Thomas §812 marg note 52a; Münchener Kommentar/Lieb § 812 marg note 56; Staudinger/Lorenz § 812 marg note 51; Larenz and Canaris 225 ff; Wieling *Bereicherungsrecht* 94; cf Münchener Kommentar/Lieb § 812 marg note 51.

⁶⁹¹ Medicus *Bürgerliches Recht* 677. Also see Larenz and Canaris *Schuldrecht II*/2 at 228-9.

⁶⁹² Loewenheim *Bereicherungsrecht* 38.

⁶⁹³ See Larenz and Canaris *Schuldrecht II*/2 at 229.

⁶⁹⁴ See Chapter Two at p 103.

The approach of our courts will now be illustrated by a description of several cases, with minimal comment, and an analysis will follow.

Bank's client purports to instruct bank to pay C but instruction defective

Let us begin with one of the 'easier' cases, i.e. one where the bank's client (B) himself purports to instruct the bank (A) to pay C, and the bank pays C without a valid instruction. *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd*⁶⁹⁵ was a case of an overpayment by a bank.⁶⁹⁶

The dispute in this case arose from dealings between a 'dealer in and exporter of polished diamonds,' African Diamond Exporters, and a firm based in the United States of America called Antwerp Distributing Co. African Diamond Exporters sent a consignment of diamonds to Antwerp Distributing. Payment was to be effected via Barclays Bank International (based in London). An official working in Barclays' London office accordingly made out a telegraphic transfer order, instructing Barnat in Johannesburg to pay African Diamond Exporters the relevant amount less bank charges. The forms used for such purpose were made of self-carbonated paper. While the original order was made out for the correct amount, an impression made on the original caused a mark to appear on the copy used for the transmission of the money. This mark, which looked like a figure 1, changed the \$18 860,88 that appeared on the original form to \$188 601,88 on the copy. Barnat in South Africa transferred the latter amount to Nedbank (African Diamond Exporters' bankers in Johannesburg) for the credit of African Diamond Exporters. African Diamond Exporters thus received approximately ten times more than it should have done. Shortly thereafter, African Diamond Exporters had \$100 000 transferred back to the bankers of Antwerp Distributing Co, it sent a

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Supra.

⁶⁹⁶

In other words, there was no instruction to pay the excess. Another case concerning an overpayment is the criminal case of *S v Graham* 1975 (3) SA 569 (A). In this case '[a] certain private company, crippled by illiquidity, hampered by mismanagement, and beset by creditors as claimant as its debtors were quiescent, unexpectedly received through the post a cheque for R37 153,88, obviously sent in error because the drawer had already paid the debt.' (See the judgment *per* Holmes JA at 571E-F). The managing director had it deposited into the company's overdrawn bank account. He was later found guilty of theft. The judgment is interesting because of the judge's view that the parties had not concluded a valid 'debt-extinguishing agreement' (though he did not call it that): see 574A-D.

further consignment to Antwerp Distributing, and it retained \$55 385 as payment therefor. The head of Antwerp Distributing Co disappeared, along with the chances of recovering the \$100 000 and the diamonds. Barclays brought an enrichment action (a *condictio indebiti*) against African Diamond Exporters, and the balance still held by the latter was returned to Barclays after institution of the action.⁶⁹⁷

To summarise the core facts with the labels used in the rest of this thesis, B (Antwerp Distributing Co) had a contract with C (African Diamond Exporters). B instructed A (Barclays/Barnat) to pay C. A paid C too much. C evidently regarded itself as enriched at B's expense, and sent \$100 000 of the excess back to B. A brought an enrichment action against C. Various questions could have been raised. Who should have sued whom on the basis of unjustified enrichment? Did C correctly give the money 'back' to B, or should it rather have given the money to A? Was A correct in suing C, or was it confined to an enrichment claim against B?

The judge only touched on these questions tangentially, as the case centred on the defence of loss of enrichment.⁶⁹⁸ In other words, it was apparently assumed that it was appropriate for A to direct its action against C and that it should be a *condictio indebiti*, and the only question was whether C had a valid defence (loss of enrichment) against A's claim. C argued that, as it had sent \$100 000 back to B, \$55 385 of the remainder had been retained as payment for the next consignment of diamonds, and the residue had been given to A, it was no longer enriched.⁶⁹⁹ A argued that C could not rely on this defence because it had immediately realised, upon receiving the money, that it had received too much.⁷⁰⁰ C's response was that the defence of loss of enrichment would still be available to a defendant who acted *bona fide* in disposing of the enrichment.⁷⁰¹ The court decided that C had not acted negligently and was *bona fide*⁷⁰² and held that C was no longer enriched by the \$100 000 or the amount it had handed

⁶⁹⁷ For the relevant facts, see the judgment at 703E-705F.

⁶⁹⁸ For a discussion of this aspect of the judgment, see D P Visser 'Responsibility to return lost enrichment' 1992 *Acta Juridica* 175.

⁶⁹⁹ At 708E-709A.

⁷⁰⁰ At 709D-710F.

⁷⁰¹ At 710G-711A.

⁷⁰² At 713A.

back to A, but that it had to hand back whatever portion of the \$55 385 constituted profit on the transaction in question (i.e. the sale of the further consignment by C to B).⁷⁰³

A argued that C should not have returned any money to B, but that it should rather have given it all back to A.⁷⁰⁴ 'I cannot agree', said the judge.⁷⁰⁵ His reasoning ran as follows: B had told C that the mistake had been made by its agent (another bank) and that its agent had debited B's account. C thus believed that B ('as principal')⁷⁰⁶ had suffered a loss that corresponded to C's enrichment. The judge accordingly held that, as C believed B and was not negligent in returning the money to A, 'there can be no objection to the refund of the overpayment direct to [B].'⁷⁰⁷ The court thus seems to have regarded C's initial perception that it had been enriched at B's expense as mistaken. In the judgment, there is no suggestion at all that B was entitled to sue C, and that A should have sued B. In other words, although there was no discussion of the underlying policy factors, the South African court arrived at the same result (regarding the direction of A's claim against C and not B) as has emerged in German law from a close analysis of the interests of the parties.⁷⁰⁸

The court's findings thus suggest that it is possible for C, in a triangular situation, to counter A's enrichment claim by proving that it (C) *bona fide* disposed of the enrichment to B. In other words, C's loss or disposal of enrichment to his contract partner, B, may be used as a defence against A. Before considering this question in more detail, I would like to look at cases where there was no contract between B and C.

Stolen and forged cheques

Typically, where a cheque has been stolen or forged, and used to pay a debt, there will be no valid contract between the payee, C, and B (a bank's client, on whose account the

⁷⁰³ 714B-C.

⁷⁰⁴ At 713A.

⁷⁰⁵ At 713A.

⁷⁰⁶ At 713D.

⁷⁰⁷ At 713D.

⁷⁰⁸ It is also interesting to note that the defence of loss of enrichment is apparently seen as providing sufficient protection to C, as is suggested by Canaris (n 8) at 825-6; Larenz and Canaris *Schuldrecht II/2* at 227.

cheque was drawn). As said above, such cases have an added layer of complexity, in that they involve four or more parties: the bank (A), its client (B), the payee (C) and the thief/forgery (X). These cases are therefore complicated by the fact that the bank's client made no instruction at all; the instruction usually emanated from X.⁷⁰⁹ Several such cases have come before South African courts. I would like to consider three of these in particular: *Nedcor Bank Ltd v ABSA Bank and Another*,⁷¹⁰ which focused on the question whether C was enriched; *Standard Bank of SA Ltd v ABSA Bank Ltd and Another*,⁷¹¹ which focused mainly on the relationship between C and his collecting bank in determining who was enriched by A's payment, and the *East Coast Design* case⁷¹² which focused on the *sine causa* requirement. The first two judgments were handed down within a few months of each other, in a year of mixed fortunes for ABSA Bank.

The facts that gave rise to *Nedcor Bank Ltd v ABSA Bank and Another*⁷¹³ were as follows: ETS, a partnership, sold certain electronic goods to Ntamakunsi. The parties agreed that the seller would deliver the goods to Ntamakunsi when he deposited the purchase price in ETS's bank account, held at ABSA. A blank bank cheque was stolen from Nedcor Bank, and was made out in ETS's favour for the exact amount of the purchase price, and the appropriate signatures were forged. It was then deposited in ETS's ABSA account, was presented for payment, and Nedcor transferred the stated amount to ABSA for ETS's account. ETS was told that the money had reached its bank account and accordingly delivered the goods to Ntamakunsi. It subsequently withdrew most of the funds, and Nedcor applied to court for an urgent order compelling ABSA and ETS to keep the remaining funds in the account until it had brought suits against both of the parties for return of the funds in question.

The applicant argued, *inter alia*, that it was entitled to relief in terms of the

⁷⁰⁹ But cf *John Bell & Co Ltd v Esselen supra*, where the bank's client, John Bell & Co, ostensibly made out a valid cheque, signed by the appropriate signatories, but one of the signatories used it to settle his private debt without the knowledge of the company. Also see *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A).

⁷¹⁰ *Supra*.

⁷¹¹ 1995 (2) SA 740 (T). The case was taken on appeal to the Supreme Court of Appeal: see *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA).

⁷¹² *Supra*.

⁷¹³ *Supra*.

condictio sine causa.⁷¹⁴ The judge said that *B & H Engineering v First National Bank of SA Ltd*⁷¹⁵ required that enrichment of the defendant/s had to be proven. He held that neither ETS nor ABSA had been enriched by the payment. He said that the increase in ABSA's assets was negated by its incurring a 'corresponding obligation' to ETS, and that the increase in the balance of ETS's bank account extinguished its claim against Ntamakunsi. The court accordingly held that '[t]he patrimony of both respondents has been left neutral by the payment' and that the only party who was enriched was Ntamakunsi.

Nedcor's counsel fell back on a call to equity. The judge's reasons for not heeding this call concern the interests of the parties: 'There is no suggestion that either of the respondents was party to the fraud. If there is to be a loss I do not see why it should be shifted from the applicant to other equally innocent parties who have not been enriched.'⁷¹⁶ The judge accordingly dismissed the application.

In this case the instruction apparently emanated from Nedcor itself, in that the stolen cheque was a bank cheque. Nedcor (A) sued ABSA and ETS together. The judge focused on the question of enrichment, and held that neither ABSA nor ETS had been enriched.⁷¹⁷ The court's finding that ABSA had not been enriched by the payment seems unproblematic: in collecting the funds it had indeed incurred a 'corresponding obligation' to ETS, as any bank does when it collects a payment on a cheque, or takes a

⁷¹⁴ It also asked for relief on the basis of the *actio Pauliana*. The judge held that the *actio Pauliana* was not an appropriate remedy for these circumstances. The *actio Pauliana*, said the judge, 'is a remedy to set aside a disposition of assets which a debtor had made for the purpose of avoiding the assets falling into his estate on insolvency and thereby becoming available for distribution to his creditors. The party to whom the disposition was made can be made to restore the property for the benefit of creditors if he colluded in the disposition or if he received the property gratuitously.' (At 729H.) As the funds in this case had never fallen into the ownership (or even the possession) of Ntamakunsi, this was not a case of a debtor trying to get rid of his assets in order to defraud his creditors and the *actio Pauliana* was therefore not relevant. This part of the judgment is generally seen as correct, and has not given rise to controversy.

⁷¹⁵ *Supra*.

⁷¹⁶ See the judgment at 730E-F.

⁷¹⁷ This aspect of the judgment gained the approval of F R Malan and J T Pretorius 'Enrichment in triangular situations, interest and the in duplum rule, and personal liability and company names' (1996) 8 *South African Mercantile Law Journal* 399 at 400. But cf D P Visser 'Unjustified enrichment' 1995 *ASSAL* 225 at 230.

deposit, and finally credits the client's account.⁷¹⁸ It holds the funds and the client has a personal right to claim those funds from it. What is problematic, however, is the other part of the judge's legal mathematics, namely his conclusion that the increase in the balance of ETS's bank account extinguished its claim against Ntamakunsi (X), and that ETS was therefore not enriched. This would only be so if X's payment in terms of their contract (X-C) was a valid one, i.e. one which would discharge the debt X-C. The judge seems to assume that it was a valid payment, as he says that Ntamakunsi was enriched (implying that his debt to ETS had been discharged). Again, as in the *African Diamond Exporters* case, the judge seems to allow C to defend itself against A's claim by saying that A's payment had extinguished C's claim against someone else (in the *African Diamond Exporters* case, C's claim lay against B; in this case, it lay against X). In other words, in this case the judge allowed C to raise against A a defence that arose from its (C's) relationship with X. He does not discuss the question of loss of enrichment as he assumes ETS was not enriched in the first place.

This judgment may be contrasted with the decision of the Transvaal Provincial Division in *Standard Bank of SA Ltd v ABSA Bank Ltd and Another*,⁷¹⁹ which also concerned a cheque that had been stolen⁷²⁰ and forged.⁷²¹ The cheque in question appeared to have been made out by Unitrans Bulk (Pty) Ltd (drawn on its bank, Standard Bank), in favour of Horn.⁷²² Horn deposited the cheque for R150 000 in his current account held at ABSA Bank.⁷²³ The cheque was then presented by ABSA, Standard Bank paid ABSA R150 000, and ABSA credited Horn's account in the relevant amount.⁷²⁴ R81 843,94 of this sum was swallowed up by Horn's overdraft, so the balance in his account after the payment was R68 156,06.⁷²⁵

⁷¹⁸ See the discussion of *ABSA Bank Ltd v Standard Bank of SA Ltd* *supra* at p 282 ff below.

⁷¹⁹ *Supra*.

⁷²⁰ See the TPD judgment at 742I.

⁷²¹ See the TPD judgment at 742I-J.

⁷²² See the TPD judgment at 742 and the SCA judgment at 250E-F.

⁷²³ See the TPD judgment at 742 and the SCA judgment at 250F. For the purposes of this discussion the defendant/appellant will be referred to as ABSA, even though the actions in question had been undertaken by its predecessor in title, Volkskas.

⁷²⁴ See the TPD judgment at 742H and that of the SCA at 250F-G.

⁷²⁵ See SCA 250G.

Believing that there was nothing wrong with the cheque, Standard Bank debited Unitrans's account.⁷²⁶ Within a week, however, it was discovered that the signatures on the cheque had been forged, and Standard Bank accordingly apprised ABSA of this fact.⁷²⁷ Standard Bank thereupon reversed the debit of Unitrans's account⁷²⁸ and obtained a court order against ABSA. ABSA accordingly paid Standard Bank R64 149,09, being the funds still in Horn's ABSA account.⁷²⁹ Standard Bank then demanded that ABSA repay the balance of the R150 000 originally transferred to it (i.e. R85 850,91).⁷³⁰ ABSA refused to do so,⁷³¹ and Standard Bank accordingly brought a suit based on unjustified enrichment (a *condictio sine causa*) against ABSA.⁷³² (Standard Bank wanted to sue Horn as second defendant but it seems that he had disappeared and it was not possible to serve a summons on him.)⁷³³ The parties subsequently agreed that Standard Bank should only claim R81 843,94, being the amount of Horn's overdraft on the date of ABSA's payment to Standard Bank.⁷³⁴

In other words, X (who was not identified) used B's (Unitrans's) cheque to instruct A (Standard Bank) to pay C. C's bank, ABSA, collected the money and some of it was credited to C's account, and some of it was used to extinguish his overdraft to ABSA. The parties, and the court, seem to assume that the amount which was credited to C's account that was not swallowed up by the overdraft constituted an unjustified enrichment at A's expense, and it was accordingly given back. In this case, the complicating factor was neither the relationship between C and B (as in the *African Diamond Exporters* case),⁷³⁵ nor the relationship between C and X (as in the *Nedcor* case),⁷³⁶ but the relationship between C and his collecting bank.

⁷²⁶ See the judgment of the TPD at 742H-I and 743A and that of the SCA at 250H.

⁷²⁷ See the TPD judgment at 743G-H and that of the SCA at 250G.

⁷²⁸ See the TPD judgment at 743B-C.

⁷²⁹ See the SCA judgment at 250H-I and the TPD judgment at 743D-F.

⁷³⁰ SCA 250I-J.

⁷³¹ See the TPD judgment at 743I.

⁷³² See *Standard Bank of SA Ltd v ABSA Bank Ltd and Another supra*.

⁷³³ See the TPD judgment at 742D and the SCA judgment at 251B-C.

⁷³⁴ See the SCA judgment at 251A-B.

⁷³⁵ *Supra*.

⁷³⁶ *Supra*.

Standard Bank argued that the cheque was a nullity,⁷³⁷ and therefore that the money had been transferred to ABSA *sine causa*. ABSA agreed with these allegations but argued that, although it had received the money physically, it had not done so as *recipiens*. In other words, legally speaking, it had not received the payment. It had merely collected the funds on behalf of its client as his agent, and '[u]pon receipt of the money, ... [Horn's] indebtedness to [ABSA] was extinguished *ex lege* by way of a set-off.'⁷³⁸ It accordingly alleged that it was not enriched at Standard Bank's expense.

The court agreed that the appropriate action in such circumstances would be a *condictio sine causa*⁷³⁹ and said that the requirements for this action are that there must have been a 'transfer of assets or payment or delivery of money ... made to the defendant *sine causa*' and the defendant must have 'thereby [been] unjustifiably enriched at the expense of the giver or payer.'⁷⁴⁰ The judge went on to say that '[t]he fact of the payment *sine causa* is *per se prima facie* proof of unjustifiable enrichment. That the payment of the money by the plaintiff to [ABSA] ... occurred ... *sine causa*, gives rise to a duty of rebuttal, which rests upon the recipient.'⁷⁴¹

The court then went on to consider ABSA's argument that it had received the payment as its customer's agent. During the course of his discussion of the legal nature of the relationship between banker and client, however, the judge switched his focus from the position of the collecting bank to that of the paying bank. He began by distinguishing this case from that of *Freeman v Standard Bank of South Africa Ltd*,⁷⁴² mainly on the grounds that latter case did not deal with a stolen or forged cheque, and rejected a dictum from that case dealing with the relationship between a collecting banker and its client. He said that a 'stolen and forged cheque can never be "the property of the customer"'.⁷⁴³

⁷³⁷ According to s 2 of the Bills of Exchange Act 34 of 1964: see the TPD judgment at 744B-C.

⁷³⁸ These arguments are outlined in the TPD judgment at pp 744-5. Also see 749F-G.

⁷³⁹ At 745C-D, where he said that the *condictio indebiti* was ruled out because there was no excusable error of fact.

⁷⁴⁰ At 745E.

⁷⁴¹ At 745F-G.

⁷⁴² 1905 TH 26.

⁷⁴³ At 746E-F.

He then considered various opinions as to the relationship between banker and client and ended this discussion of the law by saying that he was accordingly 'not persuaded by the argument that the only way to characterise or typify the right relationship between a banker and its customer is by resorting to agency.' Instead of then considering the legal relationship between the collecting bank and its client (i.e. ABSA and Horn), however, the court turned to the relationship between Standard Bank and Unitrans.⁷⁴⁴

He held that Standard Bank had not acted as the agent of Unitrans and that it was because the Standard Bank had made payment without authorisation⁷⁴⁵ and the cheque was a 'nullity' that it had had to reverse its debit of Unitrans's account.⁷⁴⁶ In support, he quotes long passages from Malan's and Cowen's works, dealing with the question of a bank paying without valid authorisation by its customer.⁷⁴⁷ Finally coming to the relationship between a collecting bank and its client, he stated that he was not convinced that ABSA had acted as Horn's agent in collecting the R150 000. He added that, even if this conclusion was incorrect, ABSA would not be entitled to the R150 000 because it could not have acquired any greater right than Horn would have had as principal, and he would not have been entitled to receive such payment.⁷⁴⁸ He concluded:

I take the view that the cheque was vitiated; the collection of the proceeds thereof was a nullity as it was not a cheque at all. Flowing from its irregular collection there could be no credit which was lawfully due to ... [Horn]. It follows that [Horn] ... could not properly and lawfully receive the proceeds of the cheque and this limitation must surely apply to [ABSA] ..., if he were to be characterised as the mere agent of ... [ABSA].⁷⁴⁹

He held that there was no set-off as the sum in question was not legally due to

⁷⁴⁴ See the judgment at 746-7.

⁷⁴⁵ At 747F, where he said that 'the plaintiff had no mandate to effect payment inasmuch as Unitrans had not authorised the plaintiff to effect payment.' Cf the introductory part of this chapter.

⁷⁴⁶ At 747F-G.

⁷⁴⁷ See 747-748, quoting from the 1983 edition of Malan's *Bills of Exchange, Cheques and Promissory Notes in South African Law* (at 282) and Cowen and Gering (n 127) (at 23-4 and 37).

⁷⁴⁸ See the judgment at 748I-J.

⁷⁴⁹ See the judgment at 749A-B.

Horn. Finally, he rejected the argument that ABSA (the first defendant) was not unjustifiably enriched (as it was not the *recipiens* of the money) in these terms:

Once the money had reached the first defendant *qua* bank, albeit illegally, ... such money became the property of the first defendant. Against such money, at the best for him, the second defendant [Horn] had a proprietary right or interest, although it had in fact become the property of the first defendant. The first defendant in this matter chose to extinguish the indebtedness, that is the overdraft of its customer, the second defendant, and to retain same on account of set-off. As I have indicated earlier, such an approach is simply unacceptable and in fact there is no question about the fact that the first defendant was unjustifiably enriched on account of retaining the amount of R81 823,94 by way of a discharge of the second defendant's indebtedness to the first defendant.⁷⁵⁰

He accordingly gave judgment for Standard Bank.

The judgment attracted a mixed response from academic commentators. Thus Visser said that it was 'sound in all respects and adds an important illustration of the proper application of the principles of the *condictio sine causa*.'⁷⁵¹ Malan and Pretorius,⁷⁵² on the other hand, were critical of the judgment. Echoing German law, they said that payment of the cheque constituted

performance by the drawee to the drawer, and performance by the drawer to the payee.... It can also be, depending on the agreement between the parties, performance or discharge by a customer of his debt to his bank, the collecting bank.... Where a cheque is accepted by a collecting bank partly in discharge of its customer's overdraft, as in the present case, the overdraft is discharged to that extent and consequently no question of enrichment of the collecting bank can arise: the bank has received what was due to it, *sum recipit*.⁷⁵³

ABSA then took the case to the Supreme Court of Appeal.⁷⁵⁴ The appeal court stated that '[i]t was common cause in the Court *a quo* that because the cheque was for present purposes a nullity and the respondent therefore had no mandate from Unitrans to

⁷⁵⁰ At 749G-I.

⁷⁵¹ D P Visser 'Unjustified enrichment' 1995 *ASSAL* 225 at 232.

⁷⁵² Malan and Pretorius (1996) 8 *South African Mercantile Law Journal* 399

⁷⁵³ At 400.

⁷⁵⁴ *ABSA Bank Ltd v Standard Bank of SA Ltd Supra*.

pay the amount thereof, payment to the appellant had been made *sine causa*.⁷⁵⁵ It was also common cause that the onus fell upon ABSA to prove that it had not been enriched by the payment. The court accordingly said that the only question at issue was whether ABSA had been enriched by the amount of Horn's overdraft.⁷⁵⁶ In order to answer this question, continued the court, it first had to be decided whether Standard Bank's payment had discharged Horn's debt to ABSA.⁷⁵⁷

The appeal court agreed with the lower court's rejection of the argument that ABSA had not been enriched by the payment as it had merely acted as Horn's agent in receiving the payment, and that Horn was thus the enriched party.⁷⁵⁸ According to Van Heerden DCJ, the collecting bank acts as its customer's agent in presenting a cheque to the drawee bank, 'but once the amount in question is effectively credited to the payee's account there is no longer any question of an agency relationship.'⁷⁵⁹ This is because of the relationship between the payee and the collecting bank. When the amount in question is reflected against the payee's account, said the judge, the payee either acquires a claim against the bank for this amount (if his account has a positive balance) or the bank's claim against him is reduced by this amount or extinguished (if his account has a negative balance).⁷⁶⁰

Thus, for example, if someone has an account with a positive balance of R1 000 and he deposits a cheque for R600 in that account, the cheque is presented and honoured and his account is credited with R600, he will a claim against the bank for R1 600. If, on the other hand, his account had been overdrawn to the amount of R1 000, the payment of R600 into the account would reduce the bank's claim against him to R400. So if a bank receives a payment from a drawee bank, and this is credited to a customer's account, the bank's net position remains the same: it receives the money from the drawee bank but the moment it credits its customer's account in this amount, it incurs a

⁷⁵⁵ See the SCA judgment at 251C-D.

⁷⁵⁶ See the judgment at 251D.

⁷⁵⁷ 251H.

⁷⁵⁸ 251E.

⁷⁵⁹ See 251E-F.

⁷⁶⁰ See the judgment at 251F.

corresponding liability to its customer or a claim against the customer is correspondingly reduced or extinguished.

The Supreme Court of Appeal also dismissed the argument that the payment had extinguished Horn's overdraft by way of set-off. The court said that

set-off did not enter the picture at all. When a customer pays a cash amount equal to the debit balance of his overdrawn account into that account, there is no question of set-off operating. He simply pays the amount owing to the bank. The position is no different if the customer deposits a cheque drawn on another bank into his account. If his bank collects payment and effectively credits his account, the debt is likewise paid (or partially paid).⁷⁶¹

The crucial question, therefore, was whether the payment discharged Horn's debt to ABSA.⁷⁶² ABSA argued that the payment had done so, and that it had correspondingly lost its claim against Horn (represented by the overdraft), so its financial position was unaffected by the payment: it had thus not been enriched.⁷⁶³ Van Heerden DCJ responded that '[t]he cornerstone of the submission is the premise that the amount of the cheque had been unconditionally allocated to Horn's account. If that premise is unsound, the edifice which counsel endeavoured to construct on it comes tumbling down.'⁷⁶⁴

The court found that the cheque payment had only provisionally been credited to Horn's account, that the forgery came to light before the clearing period elapsed, and that the 'provisional credit never became a final one.'⁷⁶⁵ The edifice thus crumbled, and ABSA failed to discharge the onus of proving that it had not been enriched.⁷⁶⁶

The *ratio* of the judgment may be summarised thus: where a bank (D) presents a forged cheque to the drawee bank (A) and receives payment from A, bank D (the collecting bank) will be liable for unjustified enrichment unless the amount in question has been unconditionally credited to a client's account. Or, put differently, in collecting

⁷⁶¹ See 251G.

⁷⁶² See the judgment at 251H.

⁷⁶³ See the judgment at 251I *in fin*.

⁷⁶⁴ At 252A.

⁷⁶⁵ See the judgment at 252B-F.

⁷⁶⁶ See the judgment at 252F-G.

payment on a cheque, a collecting bank acts as its client's agent until the cheque has been finally credited to its client's account; if, therefore, the client (C) would be unjustifiably enriched by this payment, the collecting bank will be unjustifiably enriched while it is still acting as his agent.

The facts of this case are not exactly analogous to those in the *Nedcor* case, where C had no liability (e.g. in terms of an overdraft, as in *ABSA Bank Ltd v Standard Bank of SA Ltd*)⁷⁶⁷ to the collecting bank. A case with facts that are closer to those in the *Nedcor* case is *First National Bank of Southern Africa Ltd v East Coast Design CC and Others*.⁷⁶⁸ The facts have already been sketched above: briefly, blank cheques were stolen from BP (B) and forged by Roux, who used them to pay a non-refundable deposit to his interior designers, East Coast Design (C). The interior designers did some of the work, and made some of the purchases stipulated in their contract with Roux.⁷⁶⁹ BP's banker, First National Bank (A), honoured these cheques in error and sued C for recovery of the amount thus paid to C.⁷⁷⁰ It seems that Roux ceded the 'benefits' of his contract with East Coast Design to A.⁷⁷¹

The first point to note is that the court (per Kondile J) did not even consider the possibility that First National Bank should rather have brought an enrichment action against BP. Indeed, the judge seems to regard it as self-evident that A should not sue B: 'Because no mandate was given by BP to [First National Bank] ... in respect of the payment, the loss became the [bank's] ... and not BP's.'⁷⁷²

The only question considered was whether A should sue C in such circumstances. A's first claim was based on the *condictio sine causa*. Again, the court framed the requirements for this remedy along the lines of the general requirements for enrichment liability (viz that the defendant must have been enriched at the expense of

⁷⁶⁷ *Supra*.

⁷⁶⁸ *Supra*.

⁷⁶⁹ See the judgment at 141A-F.

⁷⁷⁰ See the judgment at 140-1, and the summary at p 265 above.

⁷⁷¹ See the judgment at 141B.

⁷⁷² See the judgment at 140E-F.

the plaintiff and that such enrichment be *sine causa*).⁷⁷³

The court began by rejecting the plaintiff's argument that, according to *ABSA Bank Ltd v Standard Bank of SA Ltd*,⁷⁷⁴ 'in determining whether the payment ... was made *sine causa*, the existence of a contract between Roux and [East Coast Design] ... is irrelevant; that the decisive question remains whether a *causa* existed between [First National Bank] ... and [East Coast Design]....' The judge said that the *ABSA* case had turned on the question of enrichment, and could thus not be cited in support of these arguments. He proceeded to hold that East Coast Design had indeed been enriched at the expense of First National Bank.⁷⁷⁵ The main focus of the judgment was accordingly the question whether such enrichment was *sine causa*.

In answering this question, the court went slightly further than previous courts, defining the *sine causa* requirement as the absence of a *causa retinendi*.⁷⁷⁶ The judge cited with approval the view expressed by Visser that this requirement necessitates an evaluation of all the other requirements of the *condictio*, looked at together.⁷⁷⁷

The court then proceeded to consider these requirements again in more detail. In discussing whether East Coast Design had been enriched, the judge mentioned that East Coast Design, relying on *Govender*'s⁷⁷⁸ and *B & H Engineering*'s⁷⁷⁹ cases, had argued that the cheques had extinguished a liability 'and that it was unnecessary that there must have been some contractual duty by the payer towards the payee.'⁷⁸⁰ The court distinguished this case from those of *Govender* and *B & H Engineering* on the grounds

⁷⁷³ Cf the approach of the Appellate Division in *B & H Engineering v First National Bank of SA Ltd supra*. Also see the comment of Sieg Eiselen 'Fraudulent cheque payments and unjustified enrichment – confusion reigns' (2001) 118 *SALJ* 415: 'The court deals ... with the *sine causa* requirement as if it is a specific requirement of the *condictio sine causa specialis* and not one of the general requirements that must be proved to found enrichment liability.'

⁷⁷⁴ *Supra*.

⁷⁷⁵ 141I-J.

⁷⁷⁶ Referring to Visser's contribution to Hutchison (ed) *Wille's Principles* 634-5. See D P Visser 'Unjustified enrichment' (2000) *ASSAL* 273 at 277.

⁷⁷⁷ At 142A-C. Cf criticism of this approach by Eiselen (2001) 118 *SALJ* 415 at 416. See Visser's comments in 2000 *ASSAL* 273 at 275 in this regard.

⁷⁷⁸ *Supra*.

⁷⁷⁹ *Supra*.

⁷⁸⁰ At 142D-E.

that they dealt with countermanded, and not forged, cheques, and that the drawers and payees in those cases had concluded 'debt-extinguishing agreements', whereas there was no such agreement between BP and East Coast Design in this case.⁷⁸¹ The judge said that '[t]he bank here, unlike in the *B & H Engineering* case, is "paying somebody else's debt."⁷⁸²

The court also considered the possibility that East Coast Design could be regarded as having lost the enrichment. The plaintiff's lawyers argued that East Coast Design had no right to the full contract price for the services it had rendered in terms of the contract, as the services in question were not worth the contract price.⁷⁸³ The judge said that the contract between Roux and East Coast Design had to be looked at in its entirety and all the surrounding circumstances had to be taken into account.⁷⁸⁴ Thus he gave attention to the fact that East Coast Design turned away other profitable opportunities in order to carry out its contractual duties to Roux,⁷⁸⁵ the fact that the deposit was non-refundable, and the interior designers' willingness to perform in terms of the contract.⁷⁸⁶

This led the judge to conclude that 'the fact that [East Coast Design] ... made a bargain and profit and has been enriched in the sense of gaining as a result of the terms of the contract does not give rise to a *condictio sine causa*, or any *condictio*, since its enrichment is contractual and justified and no obligation arises from justifiable enrichment.'⁷⁸⁷ Putting it slightly differently, he held that East Coast Design 'acquired the money *ex causa onerosa* and therefore it cannot be considered to have been unjustifiably enriched.'⁷⁸⁸

⁷⁸¹ See the judgment at 142E-143B.

⁷⁸² At 143A.

⁷⁸³ At 143D-E.

⁷⁸⁴ At 143E.

⁷⁸⁵ See Visser 2000 *ASSAL* 273 at 274, where he remarks that by suggesting that such 'detrimental side effects' should be taken into account, the court had followed a similar approach to that currently espoused by English law.

⁷⁸⁶ See the judgment at 143E-J.

⁷⁸⁷ At 143J-144A.

⁷⁸⁸ At 144C-D. At 144B, the judge quoted the following sentence from *Govender's* case *supra*: '...[W]here a plaintiff sues for recovery of his property or money which has come into the hands of a defendant who received it from another, the defendant is not obliged to make restitution

To sum up then, the court reasoned as follows: BP (B) owed no debt to East Coast Design (C) and did not conclude any debt-extinguishing agreement with East Coast Design. The payment of the cheques had accordingly not extinguished any debt owed by B to C. B was therefore not enriched in the circumstances. The judge effectively held that although C was enriched, A's action against C could not succeed because C's enrichment was not *sine causa* as C had given some performance to X in exchange for the payment.

Analysis

The first point to note is that the more recent decisions suggest that the appropriate action would be a *condictio sine causa*.⁷⁸⁹ The courts state that the requirements of this action are twofold: there must be enrichment, and it must be *sine causa*. The approach of the appeal court in a banking context is to concentrate on the issue of enrichment, so I will begin with that requirement.⁷⁹⁰

Enrichment

The first question is therefore who was enriched by the bank's payment. This in turn raises the question whether any debt to C was discharged by A's payment where A received no valid instruction (whether this is called an *Anweisung*, a *delegatio solvendi* or a mandate) to make the payment. In my view, this may be answered in the negative.

Firstly, in order for an obligation to be extinguished by a cheque payment, the parties (the drawer and the payee) must conclude a valid 'debt-extinguishing

under the *condictio sine causa* where he acquired it *ex causa onerosa*, i.e. for value.... The reason is that, although there was no contract or debt as between plaintiff and defendant ... he is not considered to have been unjustifiably enriched' The court went on to consider whether members of East Coast Design would be liable to First National Bank in terms of the law of delict (based on the *condictio furtiva*, which is, in South African law, regarded as a delictual remedy.) The judge held that this claim had been abandoned by the plaintiffs and he therefore did not decide the case on this basis: see his judgment at 146B-C.

⁷⁸⁹ See the judgments discussed above, and (obiter) *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N) at 214-15.

⁷⁹⁰ As in *B & H Engineering v First National Bank of SA Ltd* and *ABSA v Standard Bank*. This approach was followed by the Witwatersrand court in *Nedcor Bank Ltd v ABSA Bank and Another supra*. Also see Visser (n 13) 541.

agreement'.⁷⁹¹ In cases where B pays C by cheque and then countermands it, the parties clearly conclude a valid and binding debt-extinguishing agreement.⁷⁹² If the drawer countermands the cheque, and the bank obeys the countermand, the drawer will have breached his debt-extinguishing agreement with C. According to the judge of appeal in the case of *B & H Engineering*, if the bank did *not* obey the countermand, and paid the cheque, '[t]he debt-extinguishing agreement achieved its purpose. The creditor (payee) received his money. There is no need or justification in my view for the law to discountenance this result.'

There may, however, be reasons for discountenancing such a result in cases where the bank paid C where it had not received any valid instruction to do so. It can be argued that any debt-extinguishing agreement concluded by the parties where there was no valid instruction to A must surely be invalid for the same policy reasons that underlie the invalidity of the cheque. Thus, if B draws a cheque on bank A and uses it to pay his creditor C, and the cheque is invalid due to non-compliance with formal requirements, the debt-extinguishing agreement between B and C must also be invalid, otherwise the formal requirements would be pointless. (For example, if B paid C with an unsigned cheque, and their debt-extinguishing agreement were valid, the debt would be extinguished notwithstanding the requirement that cheques must be signed.) Similarly, if B's signature on a cheque is forged, and X uses the cheque to pay his own debt to C, there is clearly no debt-extinguishing agreement between B and C,⁷⁹³ and any debt-extinguishing agreement between X and C must surely be void for illegality; otherwise the debt X–C could be extinguished and X could achieve the illegal result he was aiming for.⁷⁹⁴ Where the bank makes an overpayment, there would arguably be a valid debt-extinguishing agreement for the correct amount, but this would not cover the excess.⁷⁹⁵

Alternatively, one could argue that even if the debt-extinguishing agreement

⁷⁹¹ See *B & H Engineering v First National Bank of SA Ltd supra*.

⁷⁹² See *B & H Engineering v First National Bank of SA Ltd supra* at 291H.

⁷⁹³ See Eiselen (2001) 118 *SALJ* 415 at 416.

⁷⁹⁴ Thus the court's decision that Ntamakunsi was enriched by the bank's payment in the *Nedcor* case must be incorrect.

⁷⁹⁵ Because the parties (B and C) did not agree to this. In this regard, see *S v Graham supra* at 574.

were regarded as valid, the condition contained in that agreement (i.e. that payment by cheque is accepted on condition that the bank subsequently pays or honours the cheque) should not – on policy grounds – be fulfilled by the bank’s erroneously honouring the cheque.⁷⁹⁶

In other words, if the bank pays C in circumstances where it has not received a valid instruction to do so, any debt-extinguishing agreement concluded by the relevant parties⁷⁹⁷ might achieve its purpose but this result cannot be countenanced, for reasons of public policy. Otherwise there would be a situation where payments by means of unsigned cheques, or forged cheques, might have the same effect as cash payments, and the law would apparently condone violations of rules that are there to protect banks, their clients, and the payees of cheques. To accept that forged or stolen cheques could validly discharge a debt would also be to facilitate money-laundering schemes.⁷⁹⁸

The finding of the Appellate Division, in the case of *B & H Engineering*, that a bank’s payment will discharge the drawer’s debt to the payee whether or not the bank was acting within a mandate given by its client must therefore be interpreted only to apply to cases of countermand.⁷⁹⁹

The court came to its conclusion in that case by considering the relative positions of the parties. The argument that a bank’s payment should not discharge a debt where the bank had never received a valid ‘mandate’ for such payment can similarly be justified by a comparison of the interests of the parties, as is done in German law.

Thus one can argue that B (the bank’s client) should not be involved at all. As he had given no valid instruction to his bank, there is no reason why the bank’s payment should be regarded as his own payment to C.⁸⁰⁰ As the Germans would say, there is no

⁷⁹⁶ See the views of Cowen (1983) 16 *CILSA* 1 discussed above at p 236 ff.

⁷⁹⁷ In other words, the drawer/client (B) and C or, in the case of theft or forgery, X and C.

⁷⁹⁸ For such a scheme, see *First National Bank of Southern Africa Ltd v Perry NO and Others supra*.

⁷⁹⁹ Cf the distinction drawn by Kondile J in *East Coast Design* at 142E-143B.

⁸⁰⁰ It will be remembered that, in the case of *B & H Engineering v First National Bank of SA Ltd*, the Appellate Division of the Supreme Court rejected the argument that A was paying as a third party

reason to attribute A's performance to B. Or, to put it differently, there are no grounds for concluding that B should be regarded as the legal *recipiens* of A's payment: C is thus both the factual and the legal *recipiens* of the payment.⁸⁰¹ In addition, as suggested above, B arguably did not conclude any valid debt-extinguishing agreement with C for the amount in question. The South African judgments cited above all agree that B should be left out of the picture.⁸⁰² In each case the court clearly regarded it as appropriate that A direct its claim against C.⁸⁰³

So, who should bear the risk that a bank might honour a cheque that was not

and rather held that it acted as a 'neutral functionary' and that 'the debtor [paid] ... his own debt through the instrumentality of the bank.' See the judgment at 293G. Also see the discussion of the effect of A's performance on the relationship between B and C in terms of German law at p 183 above.

⁸⁰¹ In other words, there was no *datio* to B. This can be compared with the thinking behind the *Leistungsbegriff* in German law.

⁸⁰² Also see *National Bank of Southern Africa Ltd v Perry NO and Others supra* at 968A-B: 'When FNB [A] became aware of these facts it credited KwaZulu [B] with the amount of the forged cheque, as it had had no right to have debited its account in the first place.' See further *Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1997 (3) SA 300 (T) at 307B-C.

⁸⁰³ But cf the older case of *John Bell & Co v Esselen supra*. In this case, Tucker (X) and Grimbeek were the secretary and manager of John Bell & Co (B). As such, they were authorised 'jointly to sign and issue cheques on its behalf in the ordinary course of business and payment of such amounts of money as might be owing to its various creditors from time to time.' (See the judgment at 150B.) Tucker concluded a contract, in his personal capacity, in terms of which he agreed to purchase a farm from Esselen, and to pay to pay a deposit of £275. Tucker paid this amount by means of a cheque signed by himself and Grimbeek 'for and on behalf of John Bell & Company Limited'. (See 150B.) The cheque was subsequently met by the company's bankers. To summarise therefore, the bank honoured a cheque which was signed by the appropriate signatories of company B, but which was not authorised by the company as it had been signed and used for an improper purpose. The court was not prepared to impute the knowledge of Tucker and Grimbeek to the company. The recipient, C, also acted *bona fide* and received the cheque in settlement of a valid debt, owed not by B but by Tucker. B's claim against C failed. The court held that the *condictio furtiva* would not lie, as C had not been party to the fraud (see the judgment at 151F-152A). The *condictio indebiti* also failed, because the court said that this was 'not a case where a person knowingly makes a payment in a mistaken belief of fact that the payment is due: in such a case the *condictio indebiti* will lie. In this case the position is that [X] ... in fraud of and without the knowledge of [B] ... handed its cheque to [C] ... in payment of his own debt.' The court held that B had no recourse against C because the English doctrine of conversion does not apply in our law (at 153). Although it did not discuss it in these terms, the court seemed to assume that B's debt to C had been extinguished by the debt (and it said that C had given value for the cheque). This case can be distinguished from those discussed in the text in that the bank was not the plaintiff; the cheque had, from the bank's point of view, been validly completed. This case can also be compared with the more recent case of *First National Bank of Southern Africa Ltd v Perry NO and Others supra*, where the Supreme Court of Appeal (per Schutz JA) seemed to assume that C would be liable vis-à-vis A for enrichment: see the judgment at 966I-J, 968H-I and 971H-I. (In this case there were at least two triangles and, in each of them, A had an enrichment claim against C). Also cf *Firststrand Bank Ltd formerly First National Bank of SA Ltd v ABSA Bank Ltd* 2001 (1) SA 803 (W).

validly drawn by its client: the payee or the bank itself?

The bank's position is much the same in this case as it would be in the case of countermand. It has made a payment by mistake. It has accordingly breached its underlying agreement with its client and must reverse any debit made in consequence of the payment. It could justifiably be argued that the bank should have to bear the risk that its employees may make mistakes, and that it should therefore carry the loss caused by any such mistake. It should be borne in mind, however, that the primary function of the law of enrichment is to reverse unjustified gains, and not to allocate liability based on fault.⁸⁰⁴

Let us consider the position of the payee. A creditor always bears the risk that his contract partner might not pay at all, and accepting payment by cheque carries with it the risk that the cheque might be dishonoured. These are normal risks that a contractant takes upon himself. It is reasonable for him to bear such risks because he has a chance to assess the creditworthiness and honesty of his contract partner when entering into the contract.

Would the conclusion that a bank that mistakenly honoured a cheque could claim back its payment be unjustifiably adding to the risks borne by the payee, as was held in case of countermand in the *B & H Engineering* case?⁸⁰⁵ In that case, the court considered that allowing the bank an enrichment claim would increase the payee's risks because the payee would be in a worse position if the bank honoured the cheque and then reclaimed its payment than if the cheque were immediately dishonoured, because he would lose his right to sue on the cheque and thus lose the advantages of the cheque's being a liquid document. The factors to be taken into account in the case where there was no valid instruction by the client at all are slightly different. Thus, if the cheque was forged or unsigned, for example, the payee could not sue on the cheque anyway. As

⁸⁰⁴ See, e.g., see Reinhard Zimmermann 'Unjustified enrichment: the modern civilian approach' (1995) 15 *Oxford Journal of Legal Studies* 403 at 404.

⁸⁰⁵ See that judgment at 287F.

Moseneke J said in *Standard Bank of SA Ltd v ABSA Bank Ltd and Another*,⁸⁰⁶ it would be a 'nullity'. Having parted with the document would thus not cause the payee any disadvantage. Similarly, he would not lose any rights under the cheque that he would otherwise have had. Likewise, if a bank makes an overpayment, the payee clearly cannot sue for the excess on the cheque. The argument that the balance of risks would be upset by regarding the bank's payment as not having discharged any debt B–C therefore does not apply in this context.

(Bearing in mind that it was dealing with a *bona fide* payee) the court in B & H also held that the payee should not be drawn into matters between the drawer and the bank. I think that there is perhaps adequate justification for doing so in this case. For example, a payee who accepts payment by cheque should look at the document and refuse to accept it if it is unsigned, or if the name printed on the cheque is not the same as that of the signatory.⁸⁰⁷ Thus alarm bells should have rung in the minds of the employees of East Coast Design when they received a BP cheque from Roux. Similarly, a payee should realise that there has been a mistake when he receives more than he should, as happened in the case of African Diamond Exporters. In other words, as the German lawyers argue, C's reliance on the validity of the cheque is not worthy of protection in such cases.⁸⁰⁸

This raises the question whether the awareness, or *bona fides*, of the payee should play a role, as it does – at least in German law – in cases of countermand. For example, if C receives a forged cheque from X, should the fact that he is not aware of the fraud make any difference? The weight of authority in Germany says that the *bona fides* of the payee is irrelevant to the question of enrichment. This is not only the conclusion of academic writers but also of the courts. In my view, this approach should be followed in South African law because the policies underlying the rules regarding the

⁸⁰⁶ *Supra*, at 744B–C.

⁸⁰⁷ This may be contrasted with the situation of a countermanded cheque, where there is nothing on the face of the cheque to indicate that it has been countermanded: see p 257 above.

⁸⁰⁸ This was, in effect, the result in the *African Diamond Exporters* case. In *Nedcor's* case, A should thus have succeeded with an action against C (ETS).

validity of cheques outweigh the protection of C's reliance interest.⁸⁰⁹ Thus, for example, it is more important that fraud is not seen to be condoned; that parties take care to write their cheques carefully, complying with the formal requirements for validity; that banks' clients do not have their accounts debited for payments made without valid instruction; and so on.⁸¹⁰

This is, in result, what was decided by the Supreme Court of Appeal (per Schutz JA) in the case of *First National Bank of Southern Africa Ltd v Perry NO and Others*.⁸¹¹ The facts of this case, which concerned a money-laundering scheme, are extremely complicated. Any attempt to illustrate them in a diagram results in something resembling the famous map of the London underground. Essentially, there were two 'enrichment triangles'. In the first, a blank cheque was stolen from the government of KwaZulu-Natal (B1) and someone entered the name of Frankel Pollack Vinderine (a firm of stockbrokers, C1) as payee. First National Bank (A1), the drawee of the cheque, paid the amount in question to C1. A1 debited B1's account, discovered the forgery and reversed the debit.⁸¹² The court seemed to accept that this was correct, and that A1 was entitled to recover the amount in question from C1. Instead of suing C1 for enrichment, however, A1 took cession of an enrichment claim held by C1 that arose from the second triangle.⁸¹³

This second triangle concerned Frankel Pollack Vinderine (now A2), its client, Dambha (B2), 'who was alleged to have been associated with a fraud, of which the forgery of the cheque formed a part',⁸¹⁴ and Nedbank (C2). In this triangle, B2 instructed the stockbrokers, A2, to pay some of the funds received from First National Bank in terms of the forged cheque to various recipients (C2). (This instruction was presumably also tainted by the fraud and therefore defective.) One of these recipients held a bank account at Nedbank (C2), which, as collecting bank, received the funds in

⁸⁰⁹ Bearing in mind that, in many cases, he *should* be aware of the invalidity or absence of an instruction, as said above.

⁸¹⁰ These factors also outweigh the argument that cheque payments should be regarded as final.

⁸¹¹ *Supra*.

⁸¹² For these facts, see the judgment at 965F-966D.

⁸¹³ See the judgment at 966I-967A. Cf the German notion of a *Kondition der Kondition*.

⁸¹⁴ At 964D-E.

question from A2. The account-holder was insolvent, and the question was whether A2 had a valid enrichment claim against Nedbank (C2) (which would be held by A1 in terms of the cession). The court accepted that the money passed to Nedbank⁸¹⁵ and that it was enriched because the account-holder in question had no corresponding claim to the money.⁸¹⁶ The court held that, in principle, A2 had a valid enrichment claim (a *condictio ob turpem vel iniustam causam*) against C2. It is significant that the judge took great pains to expand the scope of this remedy precisely in order to hold that its requirements would be met even if the defendant was not aware of the turpitude at the time when it received the enrichment.⁸¹⁷ He therefore held that, for the purposes of this *condictio*, it was sufficient that Nedbank subsequently became aware of the illegality.

What is important about this judgment for present purposes is that it confirms that A can sue C for enrichment, and it holds that C would be liable – under the *condictio ob turpem vel iniustam causam* – despite its (C's) initial ignorance of the invalidity of the cheque. When the Supreme Court of Appeal recognises a general enrichment action, it may not be necessary even to require subsequent awareness of illegality.

The better view is thus that a bank's payment to C in the absence of any valid instruction by its client should not discharge any debt owed to C,⁸¹⁸ whether or not C was aware of the absence of such a valid instruction. This is not to say that C's potential *bona fides* has no relevance at all. Our law is similar to German law in that it allows the defence of loss of enrichment. In German law, the defence can be raised by a party who was initially enriched but who subsequently loses or disposes of the enrichment. Although there is some uncertainty as to the scope of the defence in South Africa,⁸¹⁹ it seems clear that a *bona fide* recipient would be entitled to raise such a defence in the case of loss or disposal of the initial enrichment, as was held in the *African Diamond*

⁸¹⁵ 967H-J.

⁸¹⁶ At 972C.

⁸¹⁷ See 971, particularly D-E: 'I consider that this is a case in which we may and should extend the operation of the *condictio* in order to cope with modern conditions.'

⁸¹⁸ By B or anyone else, e.g. a thief or forger (X).

⁸¹⁹ In this regard, see Visser 1992 *Acta Juridica* 175.

*Exporters case.*⁸²⁰

To sum up, A's payment to C should not discharge any debt owed to C;⁸²¹ C would thus be enriched by A's payment⁸²² (whether or not C or his contract partner had performed in terms of their contract); and C's good faith should be relevant only to the question of loss of enrichment. The payee should bear the normal risks of dishonour or non-payment, and, in addition, the risk that he might have to return a mistaken payment to the bank and thus fall back on a suit for breach of contract against his contract partner. The bank should bear the risk that the payee might *bona fide* lose or dispose of the enrichment. The bank's client should bear no risk that his bank might make a payment without his valid instruction. This seems a fair balance of the interests of the parties.

Against this background, some further observations about the cases may be made. In *Nedcor* case, A's action against C failed because C was regarded as not having been enriched; the court concluded (*obiter*) that X had been enriched by A's payment. For the reasons explained above, this decision must be incorrect.

Although the court focused on the *sine causa* requirement in the case of *East Coast Design*, it made several findings regarding the requirement of enrichment. Thus the court held that payment by means of a forged cheque did not extinguish an obligation between B (BP) and C because these parties did not conclude a debt extinguishing agreement.⁸²³ This is the same conclusion arrived at in German law: a payment resulting from a defective or non-existent *Anweisung* should not be allowed to extinguish any debt between B and C.

The judge in the *East Coast Design* case distinguished this case from *B & H Engineering* on the grounds that this case did not concern a countermanded cheque and that there was no debt-extinguishing agreement between BP (the client) and C (East

⁸²⁰ *Supra*. Also see *First National Bank of Southern Africa Ltd v Perry NO and Others supra* (*obiter*) at 972E-F. Cf, in result, *Trahair v Webb & Co supra*.

⁸²¹ Whether by B (the account-holder) or anyone else.

⁸²² In other words, C would be the *recipiens* legally as well as factually.

⁸²³ See Eiselen (2001) 118 *SALJ* 415 at 416 for approval of this aspect of the judgment.

Coast Design) in this case. That much is clear and quite unobjectionable. But it does not answer the question whether the payment by A to C extinguished the obligation that it was intended to extinguish, i.e. the obligation X–C. In other words, did the payment extinguish Roux’s obligation to East Coast Design? Kondile J did not answer this question directly. He said that “[t]he bank here, unlike in the *B & H Engineering* case, is paying “somebody else’s debt”,⁸²⁴ which implies that the bank’s payment indeed extinguished X’s debt to C. This cannot be so. Clearly the bank did not pay as a third party (i.e. this is not a Chapter Two – or *Froman v Robertson*-type – situation): the bank neither intended to settle X’s debt to C, nor did it say to C that it was paying X’s debt in its own right. As this was neither an authorised payment by a bank, nor payment by a third party, it did not extinguish X’s debt to C.

This conclusion can also be explained by saying that any debt-extinguishing agreement concluded by X and C would surely have been void for illegality, or that the cheque in question was a ‘nullity’, as suggested above. Thus the Supreme Court of Appeal in *ABSA v Standard Bank* assumed that the forged cheque was a nullity, and the only question was whether C or his bank was enriched by A’s payment. This suggests that payment by means of a forged cheque will not extinguish any obligation. This is, in effect, what Kondile J decided in the *East Coast Design* case. Notwithstanding his statement that the bank was paying the debt of another (which would suggest that X, and not C, was the enriched party),⁸²⁵ the judge came to the conclusion that C was enriched by A’s payment.⁸²⁶

The case of *ABSA v Standard Bank*⁸²⁷ turned on questions concerning the ‘route’ taken by the funds in question: had Horn (C) been enriched and some of the funds used to settle his debt to his bank (D); or was ABSA the recipient (C) and the question was accordingly whether it had lost the enrichment by passing it on to Horn, who had then

⁸²⁴ At 143A.

⁸²⁵ As dealt with in Chapter Two.

⁸²⁶ As said above, this conclusion can be supported by reference to underlying policy considerations: to allow a forged cheque to extinguish a liability would be to allow the forger to achieve his illegal purpose. Eiselen approves of the finding of the court that Roux’s debt to East Coast Design was not extinguished by the payment: see Eiselen (2001) 118 *SALJ* 415 at 416.

⁸²⁷ *Supra*.

effectively given some back to ABSA to settle his overdraft? The appeal court effectively held that Horn had never been enriched as the payment had never been unconditionally reflected against his account. Thus the money had never reached Horn's estate and the money therefore remained in ABSA's hands. In other words, ABSA was legally the recipient of the payment, and it had not lost its enrichment by provisionally crediting its client's account.

Loss of enrichment

As suggested above, C should be able to raise his *bona fide* loss or disposal of the enrichment as a defence to A's claim. Thus, in the case of *African Diamond Exporters*, C was enriched, but subsequently *bona fide* disposed of the enrichment. In that case, African Diamond Exporters (C) gave some of the enrichment to B (in terms of a subsequent contract).

Eiselen states that loss of enrichment was one of the issues in the case of *East Coast Design*, although the court did not discuss it in these terms.⁸²⁸ He criticises the court for taking into account the fact that the payment to East Coast Design was 'non-refundable' and that it had turned down further work.⁸²⁹ He says that the first factor is 'entirely irrelevant' and that the second 'must be carefully considered as it may indicate a widening of the scope of the defence of non-enrichment'.⁸³⁰

I agree that the fact that the deposit paid by Roux to East Coast Design was non-refundable was irrelevant: this was a term of the contract between Roux and East Coast Design, and could not be raised against the bank.⁸³¹ I think that the fact that East Coast Design turned down alternative work should not be taken into account in determining whether it was initially enriched by the payment. In my view, East Coast Design was initially enriched by the bank's payment. The real question was whether it subsequently

⁸²⁸ See Eiselen (2001) 118 *SALJ* 415 at 416.

⁸²⁹ Eiselen (2001) 118 *SALJ* 415 at 417.

⁸³⁰ Eiselen (2001) 118 *SALJ* 415 at 417. He uses the term 'non-enrichment' to refer to loss of enrichment. Cf criticism of this terminology by Visser 1992 *Acta Juridica* 175 at 197.

⁸³¹ In addition, it could be argued that the bank was not asking for the refund of a payment validly made in accordance with its client's instruction, but for the reimbursement of funds that had mistakenly been transferred to East Coast Design without any instruction by a client.

bona fide disposed of the enrichment.

In answering this question, any performance made in terms of the contract between C and X in exchange for the cheque payment is also entirely irrelevant. In other words, even though it seems that East Coast Design did the work and made the purchases (after receiving payment) for Roux in good faith, such performance should not have been raised as a defence to the bank's claim. As Eiselen says, 'East Coast could ... not raise its performance in terms of the contract as a defence to the enrichment claim in this case, as it still had its full contractual claim for payment from Roux, the other contractual party.'⁸³²

Although the cases of *African Diamond Exporters* and *East Coast Design* seem similar in that C received a payment and then made a *bona fide* performance – owed in terms of a contract – to the party who had apparently made the payment, they are distinguishable. In the first case, C's performance was not made in terms of its original agreement with B, but in terms of a subsequent contract. In other words, the performance by which C lost some of the enrichment was not made in exchange for the payment which seemed to emanate from B. In the case of *East Coast Design*, on the other hand, the performance made by the designers (C) was owed in terms of their original contract with Roux, i.e. it constituted counter-performance to his handing over of the cheque. Such a counter-performance can only possibly be relevant to the question whether B owed the payment to C or not. It cannot be regarded as a loss of enrichment because it is an integral part of the enquiry as to whether C was unjustifiably enriched in the first place. If the law recognises that payment by a bank in terms of a non-existent or invalid cheque does not discharge B's or X's obligation to C, C is enriched and remains enriched whether or not he has made a performance or subsequently makes a performance to B or X⁸³³ in exchange for the cheque, as he retains his contractual right

⁸³² Eiselen (2001) 118 *SALJ* 415 at 417.

⁸³³ The case of *King v Cohen Benjamin & Co supra* (at 649 ff) implies that the defence of loss of enrichment may be raised against the party who has caused the enrichment in the first place. In this case, B was apparently interested in becoming a tenant in a 'tenant ownership scheme' of a block of flats. The scheme was to be run, and the building to be built, by a company which was to be set up by X. Before the company had been established, B handed a cheque to X, as a

against B or X.⁸³⁴

To sum up, C will be enriched by the bank's payment but will only have to return the enrichment (assuming that the other requirement/s of the enrichment action are met), if he is still enriched, or if – where he is no longer enriched – he acted *mala fide* in disposing of the enrichment.

Sine causa

The second requirement posed by the courts for the *condictio sine causa* in this context is that the enrichment be *sine causa*.⁸³⁵ As said above, the approach of our highest court over the last decade has been to focus on the question of enrichment in cases involving cheque payments.⁸³⁶ In the case of *East Coast Design*, however, the court partly based its decision on the *sine causa* requirement: C was held not to be liable as it was enriched *cum causa*.

This raises several points of interest. Firstly, the fact that courts dealing with matters of enrichment in the context of cheque payments do not pay much attention to the *sine causa* requirement is not surprising. In cases where the alleged enrichment took the form of extinction of a liability, the enquiry as to whether a liability was

deposit, with the instruction that it should be held in trust by a firm of accountants, C, whom X had apparently mentioned as the prospective trustees of the scheme. C, however, did not hold the cheque in trust for B, but instead endorsed it over to X. The court held that at the time of receipt of the cheque, C was unaware of X's intentions and acted *bona fide* in diverting the cheque to X (see the judgment at 648A-E). B brought a claim against C for repayment of the amount of the cheque. B argued that the amount was claimable on the basis of the *condictio indebiti*, as it constituted payment of an unowed sum under the 'mistaken belief ... that they were the trustees under the tenant ownership scheme, when in fact they were not' (at 648F). The court rejected this argument on the basis of that C was not enriched (at 650B *in fin*).

⁸³⁴ In other words, C may only raise the defence of loss of enrichment if he *bona fide* concludes another contract (with B, or X, or anyone else) in terms of which he disposes of or loses his gain.

⁸³⁵ See, for example, *Govender v Standard Bank of South Africa supra* at 404D-405C; *First National Bank of South Africa v B & H Engineering supra* at 44B-D; *B & H Engineering v First National Bank of South Africa supra* at 285C. J C Sonnekus 'Ongeregverdigde verryking en ongeregverdigde verarming vir kondikering in drieparty-verhoudings' 1996 *TSAR* 1 says (at 8) that this requirement is of importance in limiting the number of claims based on unjustified enrichment and it also takes into account the fact that the law of enrichment forms part of the law of obligations.

⁸³⁶ As in *B & H Engineering v First National Bank of SA Ltd supra* and *ABSA Bank Ltd v Standard Bank of SA Ltd supra*. Also see Visser (n 13) at 541

extinguished necessarily entails looking at the contract – or other *causa* – from which that liability arose. The two requirements go hand in hand in such cases. If the liability is extinguished, the creditor is not enriched (his receipt of the promised performance is cancelled out by his loss of the claim thereto), and whatever he received is received *cum causa* (as it must have corresponded with the terms of the obligation for that obligation to have been extinguished). Where a debtor's liability is extinguished by his bank's payment, he will be enriched, and whether his enrichment is *sine causa* or not depends on his relationship with the bank.

If, on the other hand, the liability is *not* extinguished by the bank's payment, the creditor is enriched (as he has received something and retains his claim against the debtor), as argued above. Whether his enrichment is *sine causa* or not can potentially lead to difficulties, however. In this context, it has been held that once enrichment has been proven, it will be assumed that it was *sine causa* and the defendant bears the onus of rebutting this presumption.⁸³⁷ (This can probably be explained by the difficulty involved in proving a negative). Practically speaking, therefore, it seems that the defendant has to prove a legal ground for his enrichment, i.e. to show that it took place *cum causa*.⁸³⁸ The problem is that, in the factual circumstances presently under consideration, the defendant may have had a contract with someone other than the bank's client.

In which relationship must there be a valid *causa* for the enrichment to be justified according to South African law? For enrichment to be *sine causa*, must there be no valid obligation at all, or must it just be established that there was no valid obligation between two parties in particular? If so, who are these parties? In the case of

⁸³⁷ See *Standard Bank of SA Ltd v ABSA Bank Ltd supra* at 745F-G. This point was apparently not challenged on appeal.

⁸³⁸ Cf. Sonnekus 1996 *TSAR* 1 at 3, and at 9 where he says that 'die *onus* om iedereen van die vereistes van 'n vordering gebaseer op ongegronde verryking te bewys [rus] op die eiser. Hy moet dus ook bewys dat die vermoënvorskuiving *sine causa* plaasgevind het.' ('[T]he onus to prove any one of the requirements of a claim based on unjustified enrichment rests on the plaintiff. He must therefore also prove that the shift of assets took place *sine causa*.' My translation.) Eiselen (2001) 118 *SALJ* 415 says (at 416) that '[a] *causa* in this context could be something like a contractual or delictual obligation to make permanent or perform or a legal obligation to perform in terms of some statutory obligation such as income tax.'

East Coast Design, the court sought, and found, a *causa* for C's enrichment in C's relationship with X: C's enrichment was held to be *cum causa* because C was entitled to payment in terms of a contract with X. In *ABSA v Standard Bank*,⁸³⁹ on the other hand, the Supreme Court of Appeal seemed to look for the *causa* for the payment A–C in the bank's relationship with its client (B–A): it effectively held that the bank paid *sine causa* because it had no valid mandate from its client. Can someone raise a contract with B or X as a defence against an enrichment action brought by A? Would such a contract provide a *causa* for the shift of assets?⁸⁴⁰

If one analyses the interests of the parties, and the policies at play in situations where a bank makes a payment in terms of a stolen and forged cheque, the approach in *First National Bank v East Coast Design* (i.e. that the *causa* for the payment A–C can be found in the relationship between X and C) cannot be supported. Effectively, the court's finding opens the door for the recipient of a forged cheque to defeat the enrichment claim of the drawee bank by citing his contract with the thief or forger, i.e. the party who made the fraudulent instruction and thus caused the drawee bank to hand over the money in the first place. This seems unfair to the bank in that the very reason why it has lost money is used as a defence against its claim. It is, as it were, hit over the head with its own weapon. To accept such an approach would upset the balance of interests sketched above.⁸⁴¹

But can this position be explained by reference to legal principles? In this regard, German law, which places more emphasis on the *sine causa* requirement than South African law,⁸⁴² should be considered. As explained above, German law regards the relevant 'causal relationship' for A's payment as being the underlying contract between A and B (i.e. the banker-client contract). In other words, the *causa* for A's

⁸³⁹ *Supra*.

⁸⁴⁰ That the location of the *causa* is an important issue is shown by the fact that there has been so much debate in German law as to whether the underlying contract between a bank and its client, or the *Anweisung*, constitutes the 'causal relationship' for the bank's payment.

⁸⁴¹ For example, it is fair for C to bear the risk of the dishonesty of his contract-partner, whose character and creditworthiness C had an opportunity to assess at the time of contracting.

⁸⁴² This is probably partly because of the wording of § 812, which requires merely that someone 'receive something', and not that he be enriched.

payment to C must generally be sought in the underlying relationship between A and B. This means that A's enrichment action must generally be directed against B. In cases where there is no valid *Anweisung*, however, A will have an enrichment claim directly against C, and not against B, because A's payment cannot be attributed to B. In such cases, any contract (or other obligation) between B and C is irrelevant.⁸⁴³

Analogous reasoning may be found in South African case law. It has been repeatedly stated that an enrichment action⁸⁴⁴ can only lie between the *solvens* and the *recipiens* of a payment. This implies that the only relevant *causa* would be one lying between these two parties. Our law recognises, however, that someone other than the party who actually received ownership may be regarded as the *recipiens*.⁸⁴⁵ Similarly, someone other than the party who actually transferred ownership may be regarded as the *solvens*.⁸⁴⁶ For this to happen, there must be some ground for attributing the performance in question to this other party.⁸⁴⁷ In the circumstances presently under consideration, A's handing over would not be attributed to B: here, A is the *solvens* and C is the *recipiens* of A's payment, and therefore the only *causa* that could defeat A's enrichment claim should be one linking A and C.

Another way of explaining this is that, because there is no valid *Anweisung* in these circumstances, the associated legal fiction (that, by handing something to C, A

⁸⁴³ Because, even if there is such an obligation, it will not be extinguished by A's handing over to C.
⁸⁴⁴ A *condictio indebiti*, but the same reasoning can be applied in this context.

⁸⁴⁵ See, e.g., *Phillips v Hughes*, *Hughes v Maphumelo supra* at 228A: 'The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal, not the agent. A conduit through whom payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is.' Also see *Licences and General Insurance Co v Ismay supra* and the discussion at p 203 ff above.

⁸⁴⁶ Cf *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd supra*, where the Appellate Division rejected the argument that the parties who had made the payment (i.e. the *datio*) were not the same as those who were now suing with the *condictio indebiti*. The court held that there was ample authority in our law for the fact that a party who stood in a fiduciary relationship to the party who actually made the unowed payment is entitled to bring a *condictio indebiti* to reclaim this overpayment. It is not a very big step from this to accepting that someone who has given a mandate, appointed a delegate, or made an *Anweisung* can also claim – especially in a banking context, as the relationship between banker and client has various fiduciary aspects.

⁸⁴⁷ Such as a relationship of agency, or a fiduciary relationship.

performs to B and B performs to C) does not apply. Because B does not create this notional triangle by making an *Anweisung*, A's performance to C is in law what it is in fact: a handing over from A to C. The situation only involves two parties, and the enrichment action lies between A and C. If it is accepted that a payment by a bank in accordance with its client's instruction is a case of *delegatio solvendi*, the same reasoning can be used in our law. The Roman fiction that a *datio* by A to C can be regarded as two *dationes* (A–B and B–C) does not come into play where B has not validly instructed or authorised A to perform to C. Because there is no valid instruction or authorisation, it is not a case of *delegatio solvendi* at all, but a simple two-party situation. A's *datio* is to C; A is the *solvens* and C is the *recipiens*.

Similarly, an instruction made by a fourth party, such as a forger or thief, cannot call the fictional triangle into being. His instruction is a 'nullity', as was held in *ABSA v Standard Bank*. There is no justification, therefore, for regarding A's payment to C as a *datio* by A to X, and a *datio* by X to C. Again, it is not a case of *delegatio solvendi* but a two-party situation: A must therefore sue C directly.⁸⁴⁸

This line of reasoning implies that, where there is no valid instruction at all, the only relevant parties are A and C. This in turn suggests that the only relevant *causa* would be one lying between A and C.⁸⁴⁹ In other words, it could be argued that C cannot raise a valid contract with B or X as a defence against an enrichment claim brought by A, where A paid C in the absence of a valid instruction by B. Following this reasoning, a valid underlying contract between A and B would also be irrelevant: A might have owed the money⁸⁵⁰ to B (in terms of their banker-client contract),⁸⁵¹ but there was no valid legal justification for A to divert this to C. There might thus have been a *causa* for A to perform to B, but there was no justification for the deflection of the

⁸⁴⁸ See Eiselen (2001) 118 *SALJ* 415 at 418: 'in the instant case we are not dealing with a multi-party situation. East Coast, the enriched party, received the money or value directly from FNB without any legally recognized cause existing for the transfer of such money. ... East Coast remained enriched in that the contractual obligation with Roux and all the attendant remedies remained intact, whereas there was no legal foundation for the transfer of value between FNB and East Coast or the retention of such value.'

⁸⁴⁹ As implied by Eiselen (2001) 118 *SALJ* 415 at 415 and 416.

⁸⁵⁰ Or other performance, in contexts other than banking.

⁸⁵¹ Or any other contract, if the notion of *delegatio solvendi* is accepted in our law.

performance to C.⁸⁵² This leads to the same practical result as the widely-accepted view that A should sue C because his performance is not attributable to B.

Even if our law does not recognise the notion of *delegatio solvendi*, the conclusion that A can sue C directly, and that the only relevant *causa* would be one lying between A and C can be justified by other means. For example, one can argue that because the rights arising from a valid contract are personal (and therefore merely relative), the right to payment under a contract only applies vis-à-vis one's contract-partner. C can therefore only raise his right to payment by X against X.⁸⁵³

In the case of *East Coast Design*, therefore, the judge erred in regarding a contract between X and C as providing a *causa* for A's payment to C. This aspect of the judgment raises another interesting point, however. Referring to *Govender's* case,⁸⁵⁴ the judge held that East Coast Design 'acquired the money *ex causa onerosa* and therefore it cannot be considered to have been unjustifiably enriched.'⁸⁵⁵ The relevant passage of the judgment in *Govender's* case⁸⁵⁶ reads as follows:

...[W]here a plaintiff sues for recovery of his property or money which has come into the hands of a defendant who received it from another, the defendant is not obliged to make restitution under the *condictio sine causa* where he acquired it *ex causa onerosa*, i.e. for value.... The reason is that, although there was no contract or debt as between plaintiff and defendant ... he is not considered to have been unjustifiably enriched

⁸⁵⁷
....

This, in turn, raises the issue of the traditional requirements for the *condictio sine causa specialis*.

The *condictio sine causa specialis*

As said in the introductory chapter, the *condictio sine causa specialis* (more often

⁸⁵² Cf the views of von Caemmerer described at p 266 above.

⁸⁵³ The same reasoning would apply if the obligation in question arose from a delict, for example.

⁸⁵⁴ *Supra*.

⁸⁵⁵ At 144C-D.

⁸⁵⁶ *Supra* at 405A.

⁸⁵⁷ In this regard, cf *Commissioner of Customs and Excise v Bank of Lishon International Ltd and Another* 1994 (1) SA 205 (N) at 214-215.

simply called the *condictio sine causa*) is available in several situations.⁸⁵⁸ It can be brought against someone who has *bona fide* disposed of or consumed (a) the property of another where he came into the possession thereof through a *negotium* between himself and the owner, or (b) money received *ex causa lucrativa* where there was no such *negotium*.⁸⁵⁹ Or it can be used as a *condictio ob causam finitam*, i.e. where there is a *causa* for transfer but it later falls away. Finally, it can be used to reclaim money or other property transferred to another *sine causa*, in circumstances where none of the other *conditiones* would be applicable.⁸⁶⁰

In a note on the *East Coast Design* case,⁸⁶¹ Visser suggests that the form of *condictio sine causa* used in these banking cases is the last one; the *condictio sine causa* in its guise as a catch-all or 'rag-picker'.⁸⁶² He implies that Kondile J treated the *condictio sine causa* in this case as if it fell into the first category, however, in that he asked whether the payment was received *ex causa onerosa*. Eiselen makes a similar point by saying that the first category of the *condictio sine causa* is designed for 'enrichment chain' type situations (although he does not call them this)⁸⁶³ and there was no enrichment chain here.⁸⁶⁴

This raises the question whether these rules *should* be extended to the 'rag-picker'-type *condictio sine causa specialis*. Should we follow the German approach of taking general rules developed in the context of enrichment chains⁸⁶⁵ (viz claims should

⁸⁵⁸ See Chapter One at p 9 ff.

⁸⁵⁹ See J G Lotz 'Enrichment' *LAWSA* vol 9 (revised by A de W Horak), First reissue (1996) para 88 and Visser 2000 *ASSAL* 273 at 275; Hutchison (ed) *Wille's Principles* 638.

⁸⁶⁰ See Chapter One at p 9 ff.

⁸⁶¹ 2000 *ASSAL* 273 at 275 ff.

⁸⁶² Zimmermann *Law of Obligations* 871; Grotius 3.30.18. See Visser 2000 *ASSAL* 273 at 276; Hutchison (ed) *Wille's Principles* 639.

⁸⁶³ See Eiselen (2001) 118 *SALJ* 415, where he calls such situations 'third-party enrichment' (at 417). It is clear that he is referring to enrichment chains, however, as (at 418) he refers to them as 'situations where the property in question has moved down a chain of recipients and where there has been no direct dealing between the impoverished party and the enriched party.'

⁸⁶⁴ Eiselen (2001) 118 *SALJ* 415 at 417-18. As said in footnote 848 above, he goes even further and says (at 418) that 'in the instant case we are not dealing with a multi-party situation. East Coast, the enriched party, received the money or value directly from FNB without any legally recognized cause existing for the transfer of such money.'

⁸⁶⁵ Regarding enrichment chains, see Chapter One above.

follow the pattern A–B–C unless there are exceptional circumstances)⁸⁶⁶ and applying them by analogy to so-called ‘triangular situations’? As has been pointed out, cases dealing with the *condictio sine causa* in a banking context generally state that the only requirements are that the defendant was enriched (at the expense of the plaintiff) and that this enrichment was *sine causa*.⁸⁶⁷ Thus the courts seem to equate the requirements for this species of *condictio sine causa* with the general requirements for enrichment liability.⁸⁶⁸ The rules developed in this context might therefore be extrapolated to apply in other situations once the court recognises a general enrichment action. Should these (‘enrichment’ and absence of a *causa*) be the only requirements for this form of the *condictio sine causa* or the general action?⁸⁶⁹

Visser is apparently of the view that the requirements that property be acquired via a *negotium* or money be acquired *ex causa lucrativa* should not be extended beyond cases of *bona fide* disposal or consumption.⁸⁷⁰ Thus he says that these rules are not appropriate for cases where a bank pays money to another, because crediting the account of the payee does not amount to ‘consumption or alienation’.⁸⁷¹

⁸⁶⁶ Such as where C received something gratuitously: § 822 BGB.

⁸⁶⁷ See p 300 above.

⁸⁶⁸ See Eiselen (2001) 118 *SALJ* 415, where he says that, in the *East Coast Design* case, the court dealt with ‘the sine causa requirement as if it is a specific requirement of the *condictio sine causa specialis* and not one of the general requirements that must be proved to found enrichment liability.’

⁸⁶⁹ De Vos, for example, requires that the enrichment take place directly at the expense of the plaintiff, as is required by German law for the *Nichtleistungskonditionen*: see De Vos *Verrykingsaanspreeklikheid* 339–53.

⁸⁷⁰ See Visser 2000 *ASSAL* 273 at 276 and (impliedly) Eiselen (2001) 118 *SALJ* 415 at 418. Also see Eiselen and Pienaar *Unjustified Enrichment* 76–8, where they say that the *negotium* requirement should not be resuscitated.

⁸⁷¹ 2000 *ASSAL* 273 at 275–6. He explains the reasoning behind these rules as follows: ‘The underlying idea seems to be that a person who comes into possession of the property of another, as a result of dealings between them, knows that she is not the owner. Therefore she should ordinarily also know that she cannot legitimately dispose of or consume the property. If the property is nevertheless disposed of or consumed (*bona fide*, and perhaps because of a misunderstanding), the possessor cannot be heard to complain about returning the value which remains in her estate and which is not covered by a *causa* such as a contract, for instance. ... If, however, a person comes into possession of the property of another without there having been dealings between her and the owner, and she gives value in exchange, the chances are very good that she might not realise that she is dealing with the property of another and that she should not consume or destroy it. ... In these circumstances it would not be inequitable for [her] ... to have to return the value which remains in her patrimony to the owner. However, if the possessor has not given any value in exchange for the property, then she cannot complain if she has to return the value remaining in her estate.’ He goes on to say (at 276) that these rules ‘are not really

It should be noted, however, that these two concepts (a *negotium* and a *causa lucrativa*) bear a striking resemblance to certain principles of German law that are applicable in situations of multi-party enrichment. As explained in Chapter One, the parties to an enrichment action in German law are, generally speaking, the parties who are linked by a 'causal relationship'.⁸⁷² In other words, in enrichment chains and triangular situations, A must generally sue B, and B must sue C: they must proceed 'via the triangle' or along the chain.

This idea of a 'causal relationship' is reminiscent of the Roman notion of a *negotium*, which was required between the parties to a *condictio sine causa*,⁸⁷³ and which could have served a valuable purpose in limiting the pool of potential parties to an enrichment action.⁸⁷⁴ The word 'negotium' seems to have had various meanings in Roman law, ranging from any sort of activity⁸⁷⁵ to the conclusion of a contract.⁸⁷⁶ In

capable of application in a case such as the one under discussion. After all, the money paid over by the drawee bank to the payee can hardly said to be consumed or alienated by the payee when it is paid into his or her account.'

⁸⁷² This does not mean that the enrichment of one party and the impoverishment of the other must be causally linked in that one is the result of the other. (Cf Hutchison (ed) *Wille's Principles* 634: 'A causal link between the defendant's enrichment and the plaintiff's impoverishment'.) It merely refers to some sort of relationship between the parties that would have provided a *causa* had it been valid, e.g. a defective contract. See Chapter One at p 46 ff.

⁸⁷³ See, e.g., De Vos *Verrykingsaanspreklikeid* 34-5, 54 and 60. It should be noted, however, that De Vos regards it as something which 'went hand in hand with the transfer of ownership or possession' (at 34 – my translation). He interprets it as requiring a direct transfer of ownership or possession from the owner or his agent to the defendant.

⁸⁷⁴ See J P Dawson *Unjust Enrichment: A Comparative Analysis* (1951) 52 (regarding the views of Julian): 'His reason, the absence of any direct dealing between plaintiff and defendant, expressed a practical limitation, the kind of working rule that kept the remedy manageable though it could be breached occasionally where reasons were good.' Regarding the *condictio incerti*, he says 'the requirement of a prior *negotium* between the parties was used to confine this expanded remedy within acceptable limits.' He goes on to say that '[t]he instances are rare indeed in which a condictio was awarded in the absence of an antecedent "giving" by the plaintiff to the defendant or else of a prior agreement between the parties whose correction or enforcement was sought.' Regarding the limitations consequent on this requirement, also see Zimmermann *Law of Obligations* 874. But cf De Vos *Verrykingsaanspreklikeid* 111, where he says that it created more problems than benefits.

⁸⁷⁵ See M de Villiers 'Negotium in Roman Law' (1928) 45 *SALJ* 223: 'The original form of the word *negotium* was *nec otium*, the negation of inactivity, hence it was used to denote active employment.'

⁸⁷⁶ See De Villiers (1928) 45 *SALJ* 223: 'On the other hand, *negotium* acquired a wider meaning in the case of contract as denoting that transaction itself, especially when in the making, and a better meaning may be it comprised a "reciprocal agreement of some sort".' (My emphasis). See Dawson (n 874) at 51 and 52 for the translation as 'direct dealings'.

modern South African law, the word has been interpreted to refer to 'dealings'⁸⁷⁷ or 'an antecedent legal relation'⁸⁷⁸ between the parties.⁸⁷⁹ In other words, it can be seen as referring to a link between the parties that falls short of a valid contract.⁸⁸⁰ A relationship between the parties that could have resulted in a *causa* for the enrichment – but did not – is what German lawyers would call a 'causal relationship'. This relationship, which can be translated as an 'invalid obligatory act',⁸⁸¹ would most commonly be a defective contract (i.e. where the negotiations, or even the agreement, between the parties did not receive the stamp of legal validity).

The *negotium* was apparently abandoned as a general requirement for the *condictio sine causa* in Roman-Dutch law,⁸⁸² and is now confined to cases of *bona fide* consumption or disposal of property.⁸⁸³ I think that the idea of a *negotium* could also fulfil a useful function in banking cases, and in other situations where the more general ('rag-picker') form of the *condictio sine causa specialis* is appropriate. It could be used

⁸⁷⁷ See, e.g., Visser 2000 *ASSAL* 273 at 276.

⁸⁷⁸ But see Eiselen and Pienaar *Unjustified Enrichment* 76.

⁸⁷⁹ See Van Zyl *Negotiorum Gestio* 11n34: 'The basic meaning of the concept did not change in Roman-Dutch or, for that matter, early South African law....' He goes on to say that the word *negotium* 'continues to indicate any kind of action or activity which may give rise to an obligation.'

⁸⁸⁰ See Zimmermann *Law of Obligations* 854: 'Some of them ... experimented with the concept of *negotium contractum*; a *condictio*, they claimed, could be instituted only if the *datio* had been based on a cooperation between giver and recipient, supported by the intention of both of them to enter into a transaction.' Also see Sir John G. Kotze *Causa in the Roman and Roman-Dutch Law of Contract* (1922) at 66, where, regarding the views of Ulpian, he says that '[b]y this he intends to convey that the convention or agreement *partakes somewhat of the nature of a contract (negotium)*....' (My emphasis.) The word was apparently sometimes used to refer to a valid contract in Roman and Roman-Dutch law. (See, for example, De Villiers (1928) 45 *SALJ* 223, where, referring to Huber and to Damhouder, he says that '[p]ost-Roman commentators on the law also sometimes used the word *negotium* to denote an agreement amounting to a contract. Thus Huber refers to a *negotium habile ad obligationem producendam*, a contract capable of establishing an obligation (thus a *causa obligationis*), as was rightly held by DE VILLIERS, J., in the case of *Conradie v Russouw* (1919), App. Div., 314 [i.e. *Conradie v Rossouw* 1919 AD 314]. For facility of proof the Roman law required that in a written acknowledgement of debt the antecedent *negotium* or transaction which had occasioned the liability should be expressed. (*Cod.* 4.30.13; *Digest*, 22.3.25, sec. 4).') Also see Kotze *op cit* at 35 and 55.) The word cannot be understood to carry this meaning in the modern law of unjustified enrichment, however, as it is accepted that a contract excludes enrichment liability. In this regard, see for example Sonnekus 1996 *TSAR* 1 at 8.

⁸⁸¹ See Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 32.

⁸⁸² De Vos *Verrykingsaanspreeklikheid* 76-7. (But see note 873 above for the meaning apparently attached by De Vos to the word *negotium*.)

⁸⁸³ See Visser 2000 *ASSAL* 273 at 275.

to give the *sine causa* requirement some sort of positive content and it could play the same sort of role that the notion of 'causal relationships' plays in German law, viz to help to identify the parties to an enrichment action.⁸⁸⁴

It should be emphasised, however, that the idea that an enrichment action should lie between the parties to a 'causal relationship' should be regarded as a guideline rather than an inflexible rule.⁸⁸⁵ It is merely one of the factors to be considered when assessing policy factors and the relative interests of the parties. Thus Canaris⁸⁸⁶ refers to 'causal relationships' but this concept is, in a sense, merely the lens through which he focuses on what is really important: the interests of the parties, and general legal values and norms. German experience has thus shown that there are situations where the underlying policies and the interests of the parties suggest that an enrichment action should lie between parties who are *not* linked by such a 'causal relationship'.

In exceptional circumstances, therefore, an action will lie directly between A and C. In German law, the most important exception – which is contained in § 822 BGB – is the situation where C acquires the enrichment gratuitously, i.e. *ex causa lucrativa*.⁸⁸⁷ (Again, this is an echo of one of the requirements for the *condictio sine causa specialis* in our law.) German law accepts that there are other exceptions, however, such as the one presently being considered, i.e. where a bank paid C in the absence of a valid instruction by its client. There is clearly neither a 'causal relationship' nor a *negotium* between A and C in such circumstances, yet the majority view in Germany is that A

⁸⁸⁴ Another argument in favour of interpreting a 'negotium' in this way, and using it as a general requirement relates to the relationship between the law of contract and the law of unjustified enrichment. The Roman 'law' of unjustified enrichment reflected the Roman law of (specific) contracts. It was developed to hug the boundaries of contractual liability. Attempts to substitute a general basis for enrichment liability (or a 'general enrichment action') partly reflect the changes in our law of contract. It does not make sense to have a law of enrichment that still largely bears the strange outline determined by Roman contract law, when we have general principles of contract. It is particularly strange that we have abandoned one of the most 'general' of the common-law requirements (viz that there was a *negotium* between the parties) and that we keep more specific requirements.

⁸⁸⁵ Cf the comments of Canaris (n 8) at 857.

⁸⁸⁶ (n 8).

⁸⁸⁷ For example, where B intended to make a donation to C. According to the *herrschende Meinung*, performance in terms of a void contract would not be regarded as a gratuitous performance: see *Jauernig/Schlechtriem* § 822 marg note 5.

should sue C on the basis of unjustified enrichment.

In his comment on the *East Coast Design* case, Visser asks whether ‘the payment of a cheque (drawn on a bank by its client) to a payee amounts to “dealings” between the bank and the payee.’⁸⁸⁸ He interprets the judgment in the *East Coast Design* case as answering this question in the negative because the judge ‘applied the rule that when value is given the *condictio sine causa* is excluded – a rule which is relevant only to a situation where no dealings took place between the plaintiff and the defendant.’⁸⁸⁹ Approving of this conclusion, he adds that ‘the kind of dealings relevant to the *condictio sine causa* are those *as a result of which* the transfer of money or property takes place.’⁸⁹⁰ He concludes that the bank’s payment did not result from any dealings between itself and East Coast Design,⁸⁹¹ as the bank had merely acted as a ‘conduit for discharging Roux’s debt to East Coast Design.’⁸⁹²

I agree that the dealings generally required for the *condictio sine causa* are those which led to the transfer of money or other property and that were no dealings between the bank and East Coast Design. I do not agree that this means that the *condictio sine causa* should fail; this should be regarded as an exceptional situation in which an action will lie despite the absence of such dealings.⁸⁹³ We already have one exception, namely the situation where money was received *ex causa lucrativa*. As argued above, an analysis of the interests of the parties suggests that a bank, which paid C without receiving any valid instruction or authorisation for that payment from its client, should be able to recover that payment from C. As in German law, we should accept that a

⁸⁸⁸ 2000 ASSAL 273 at 276.

⁸⁸⁹ 2000 ASSAL 273 at 276.

⁸⁹⁰ 2000 ASSAL 273 at 277.

⁸⁹¹ He points out (2000 ASSAL 273 at 277) that there were some dealings between the parties, as East Coast had ceded its rights against Roux to the bank, but does not consider these relevant because the payment had not resulted therefrom.

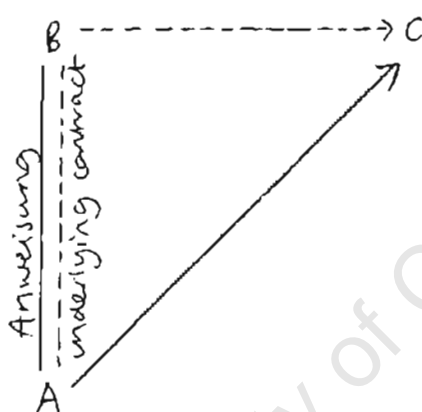
⁸⁹² 2000 ASSAL 273 at 277.

⁸⁹³ I also cannot agree that the bank acted as a ‘conduit’ (or a ‘neutral payment functionary’, as stated by Eiselen (2001) 118 SALJ 415 at 416). As was suggested in my discussion of the *B & H Engineering* case above, regarding the bank as a mere ‘neutral payment functionary’ or a ‘conduit’ is not objectionable where the bank was acting in terms of a valid instruction, but it is strange to think of it in this way where it was disobeying a countermand, or where no valid instruction had been given. With respect, I find it is particularly strange to regard the bank as acting as a conduit for the performance by a forger to his creditor, as Visser suggests.

payment *ex causa lucrativa* is not the only circumstance in which an enrichment action will lie in the absence of a *negotium* between the parties. It could even be argued that this case is analogous to a receipt *ex causa lucrativa* because the payment was not owed by A to C.

To conclude, A should be able to bring an enrichment action – the *condictio sine causa* – directly against C in circumstances where A made a payment to C in the absence of a valid instruction by B.

3 **Both the relationship between the instructing party and the recipient (the *Valutaverhältnis*) and the underlying contract between the instructing and instructed parties (the *Deckungsverhältnis*) are defective**



Now situations of *Doppelmangel* ('double-fault') within this context must be considered. For example, B instructs A, whom he erroneously thinks is his debtor, to perform to C, whom he erroneously thinks is his creditor. Similarly unaware of the invalidity of the agreements,⁸⁹⁴ A makes the performance to C, intending thereby to fulfil his (supposed) contract with B.⁸⁹⁵ Such a case might arise, for instance, if B was insane when he purported to conclude contracts with A and C.⁸⁹⁶ In such a case, the parties would not be linked by any valid contractual relationships, and yet C would have received ownership of the money (by *commixtio*).⁸⁹⁷

⁸⁹⁴ In other words, § 814 BGB will not be applicable.

⁸⁹⁵ See, e.g., Koppensteiner and Kramer *Bereicherung* 27

⁸⁹⁶ Cf the facts of *The Standard Bank of South Africa Ltd v Haskins supra*.

⁸⁹⁷ See *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 at 967H-J.

German law

In terms of German law, this would be regarded as a case of so-called *Doppelmangel* ('double fault'). While it is now accepted that A must sue B, and B in turn must seek recourse from C,⁸⁹⁸ the old view was that, if both legal relationships⁸⁹⁹ were invalid, a *Durchgriff* would be possible.⁹⁰⁰ In other words, A would be able to sue C directly on the basis of unjustified enrichment. Arguments in favour of this approach were that it was straightforward, that it was consistent with the law's general emphasis on the purpose of the performing party,⁹⁰¹ and that it would save expense in that only one action would have to be brought, rather than two.⁹⁰² Moreover, it was pointed out that in such circumstances, it was clear that C had been enriched, but not so clear that B had been enriched by A's payment to C, as he would not have thereby been released from any obligation.⁹⁰³

What countervailing arguments then convinced the vast majority of writers⁹⁰⁴ to abandon this view, and to accept that A can only sue B, and that B must sue C in such

⁸⁹⁸ See, e.g., Medicus *Bürgerliches Recht* marg note 675; Koppensteiner and Kramer *Bereicherung* 27-8; Loewenheim *Bereicherungsrecht* 33; Wieling *Bereicherungsrecht* 101. Wieling *loc cit* says that this also corresponds to the intention of the legislators, and quotes Von Kübel: 'Hat jemand an den Gläubiger eines Dritten für Letzteren geleistet, um damit eine Verbindlichkeit gegen den Dritten zu erfüllen, so kann er, auch wenn diese Verbindlichkeit nicht bestand [i.e. *Valutaverhältnis*], das Geleistete von dem Empfänger nicht zurückfordern, ausgenommen wenn dieser das Nichtbestehen der Verbindlichkeit und die Absicht des Leistenden, solche zu erfüllen, gekannt hat.' ('If someone performed to the creditor of a third party on behalf of the third party, in order to fulfil an obligation against the third party, he cannot claim back from the recipient whatever was performed, even if this obligation did not exist, except if the recipient knew of the non-existence of the obligation and the intention of the performing party to fulfil it. My translation.) Wieling adds that the wording of the provision also covered the case where A had no obligation vis-à-vis B (i.e. *Deckungsverhältnis*) but that the First Commission axed the provision as it regarded it as self-evident, and the Second Commission did not change the position.

⁸⁹⁹ In other words, contracts or other obligatory legal relationships on the basis of which payment was made.

⁹⁰⁰ Canaris (n 8) 801; Loewenheim *Bereicherungsrecht* 33-4; Koppensteiner and Kramer *Bereicherung* 27. Also see note 308 above.

⁹⁰¹ Koppensteiner and Kramer *Bereicherung* 27 (where they add that the more roundabout route was not seen as being in accordance with the 'Zweckstrebenden Natur der Rechtsordnung' i.e. the 'striving for purpose of the legal system'); Loewenheim *Bereicherungsrecht* 33.

⁹⁰² See, e.g., Loewenheim *Bereicherungsrecht* 34.

⁹⁰³ Koppensteiner and Kramer *Bereicherung* 27. They argue that this argument 'amounts to a *petitio principii*, because it is immediately questionable whether B would not be enriched by the payment of A in so far as he can now bring a *Leistungskondition* against C.' Cf Wieling *Bereicherungsrecht* 101.

⁹⁰⁴ Koppensteiner and Kramer *Bereicherung* 28: 'ganz [herrschende Literatur]', 'nach überwiegender Ansicht'.

circumstances?⁹⁰⁵ The answer will by now be a familiar one: that if a *Durchgriff* (a direct action A–C) were allowed, C would not be able to raise any defences,⁹⁰⁶ rights of retention, or possibilities of set-off that he might have against B, and A would be exposed to the defences of C.⁹⁰⁷ These interests would only be protected if the parties were forced to proceed ‘via the triangle’. A further argument in favour of this solution is that it also allocates the risk of insolvency in such a way that each party only has to bear the risk that his supposed contract partner might go insolvent.⁹⁰⁸ In other words, a plaintiff only has to reckon with the possibility that his claim might come to naught due to the insolvency of someone whom he had sought out as a contract partner, and not because of the insolvency of an extraneous third party. So, to use our banking example, the bank (A), which only has a (supposed) legal relationship with its supposed client, B, should only be exposed to the risk of B’s insolvency, and not to the danger that B’s supposed contract partner, C, might go insolvent.⁹⁰⁹

But what about the arguments raised in favour of the *Durchgriff*? While the need to distribute the risks fairly amongst the parties might outweigh arguments in favour of simplicity and prevention of legal costs, the third point (i.e. what has B ‘received’ in such circumstances?)⁹¹⁰ is not as easily dismissed. It is important to prove that B has received something (‘erlangt etwas’), not only in order to satisfy the requirements for an enrichment action,⁹¹¹ but also in order to determine the *quantum* of A’s claim against him.⁹¹²

The first proposal for circumventing this problem was to argue that C had

⁹⁰⁵ See, e.g., Medicus *Bürgerliches Recht* marg note 675; Loewenheim *Bereicherungsrecht* 33; Canaris (n 8) 801; Wieling *Bereicherungsrecht* 101 (where he also says, in relation to an example where B buys a table from C, pays by cheque and then countermands it, that it would make no difference whether C delivered the thing to B before or after receiving the purchase price).

⁹⁰⁶ If C had made a counter-performance to B, as in Wieling’s example (see previous footnote), then C has thereby (i.e. by making the reciprocal counter-performance) secured himself against all risks, and should therefore not be burdened with the risk that he might be sued by A: Wieling *Bereicherungsrecht* 101.

⁹⁰⁷ See, e.g., Koppensteiner and Kramer *Bereicherung* 28; Loewenheim *Bereicherungsrecht* 34.

⁹⁰⁸ See, e.g., Koppensteiner and Kramer *Bereicherung* 28.

⁹⁰⁹ See, e.g., Loewenheim *Bereicherungsrecht* 34.

⁹¹⁰ See, e.g., Loewenheim *Bereicherungsrecht* 34; Koppensteiner and Kramer *Bereicherung* 28.

⁹¹¹ Cf the wording of § 812 BGB: see Appendix A.

⁹¹² Loewenheim *Bereicherungsrecht* 34.

received the payment without legal ground and was therefore liable for enrichment, and that what B had received was this enrichment claim against C.⁹¹³ A's claim against B would therefore be a 'Kondiktion der Kondition' (a *condictio conditionis* or 'an enrichment claim to an enrichment claim').⁹¹⁴ If the action against B succeeded, then B would have to cede to A his claim against C.⁹¹⁵ This argument wilted under the glare of Canaris's criticism.⁹¹⁶ He argued that such a solution would result in A's having to bear an unjust accumulation of risks.⁹¹⁷ Because a debtor (C) may raise against the cessionary (A) any defences he would have had against the cedent (B),⁹¹⁸ A would be faced not only with any defences arising from his relationship with B, but also with C's defences against B, arising from the cession.⁹¹⁹ He would also have to carry the risk of the insolvency of the person who instructed him (B), as well as of the person who became his debtor by virtue of the cession (C).⁹²⁰

Canaris accordingly suggests that, assuming that B receives an enrichment claim against C in this situation,⁹²¹ one need not require that he cede the claim to A, but rather that he give A its value⁹²² if a defence exists against his claim against C or if this claim

⁹¹³ Loewenheim *Bereicherungsrecht* 34.

⁹¹⁴ See the discussion of 'enrichment chains' in Chapter One at 57 ff above.

⁹¹⁵ And the defences afforded by the law of cession would therefore also be available: see Koppensteiner and Kramer *Bereicherung* 28; Loewenheim *Bereicherungsrecht* 34.

⁹¹⁶ See Canaris (n 8) 811-12.

⁹¹⁷ Canaris (n 8) 811: 'Kumulierung sämtlicher Risiken'. He criticises the then *herrschende Meinung* for 'absurdly' purporting to base their arguments on an attempt to allocate the risks of insolvency and the existence of defences appropriately, and then 'completely failing' in this attempt: *loc cit*. He says that while the *Durchgriffskondiktion* allocated risk incorrectly, it at least did not result in an accumulation of all the risks in one party and can therefore be seen as 'the lesser of two evils': *op cit* 811-12. Cf J Esser and H-L Weyers *Schuldrecht II Besonder Teil Teilband 2* 383 who ask whether this solution really would lead to unacceptable hardship. Also see Medicus *Bürgerliches Recht* marg note 673, where he points out, *inter alia*, that B (not A) would have had to bear the risk, had the *Anweisung* been valid.

⁹¹⁸ According to § 404 BGB: 'Der Schuldner kann dem neuen Gläubiger die Einwendungen entgegensetzen, die zur Zeit der Abtretung der Forderung gegen den bisherigen Gläubiger begründet waren.' ('The debtor can raise against the new creditor those defences that were valid against the previous creditor at the time of the cession.')

⁹¹⁹ Canaris (n 8) 811. Also see, e.g., Loewenheim *Bereicherungsrecht* 34.

⁹²⁰ Canaris (n 8) 811; Loewenheim *Bereicherungsrecht* 34.

⁹²¹ See Canaris (n 8) 811: '... die Bereicherung des Anweisenden [liegt] lediglich in seinem Bereicherungsanspruch gegen den Anweisungsbegünstigten, denn er ja letztlich nur einen Anspruch gegen diesen erhält.' Cf Loewenheim *Bereicherungsrecht* 34, where he argues that A should proceed against B because B has received, not the claim against C, but the thing itself ('...die geleistete Sache selbst'). In other words, B should return either the thing or its value.

⁹²² In terms of § 818 (2) BGB: 'Ist die Herausgabe wegen der Beschaffenheit des Erlangten nicht

is rendered useless by C's disappearance or insolvency.⁹²³ This is the only way to avoid a situation in which A would be affected by circumstances that lie in the *Valutaverhältnis* (i.e. the relationship between B and C), and therefore solely within the sphere of risk of his supposed contract partner.⁹²⁴ This solution means that only B would have to carry the risk of C's insolvency or potential defences.⁹²⁵

This proposal has also met with criticism.⁹²⁶ The main objection arises from § 818 (3) BGB, which states that the obligation to give up the object or its value is excluded to the extent that the recipient is no longer enriched.⁹²⁷ If B's claim against C is worthless because C has disappeared or become insolvent, then how can B be said still to be enriched?⁹²⁸ As Koppensteiner and Kramer point out, no claim for restitution of value can arise independently of possible defences.⁹²⁹

Notwithstanding criticisms such as this, and notwithstanding the fact that the court still uses the *Kondiktion der Kondiktion*,⁹³⁰ the view that A should sue B for the value of his enrichment claim against C seems to be the most accepted opinion today.

It is also agreed, however, that in various⁹³¹ exceptional circumstances A may bring an enrichment action directly against C (i.e. a so-called *Durchgriffskondiktion*).⁹³² The first set of circumstances in which such an action would be afforded to A are those

möglich oder ist der Empfänger aus einem anderen Grunde zur Herausgabe außerstande, so hat er den Wert zu ersetzen.' ('If it is not possible to give up what has been received, or if the recipient is unable to give it up for some other reason, he must replace its value.') See Canaris (n 8) 812; Medicus *Bürgerliches Recht* marg note 673; Koppensteiner and Kramer *Bereicherung* 28.

⁹²³ Also see Koppensteiner and Kramer *Bereicherung* 28.

⁹²⁴ See Canaris (n 8) 819. Also see Koppensteiner and Kramer *Bereicherung* 29.

⁹²⁵ See Loewenheim *Bereicherungsrecht* 34.

⁹²⁶ See, e.g., Medicus *Bürgerliches Recht* marg note 673; Koppensteiner and Kramer *Bereicherung* 29.

⁹²⁷ *Die Verpflichtung zur Herausgabe oder zum Ersatze des Wertes ist ausgeschlossen, soweit der Empfänger nicht mehr bereichert ist.* (The obligation to restore or to replace the value is excluded in so far as the recipient is no longer enriched.) See Appendix A for the context of this provision.

⁹²⁸ See, e.g., Loewenheim *Bereicherungsrecht* 34.

⁹²⁹ *Bereicherung* 29.

⁹³⁰ See Medicus *Bürgerliches Recht* marg note 673.

⁹³¹ But cf Medicus *Bürgerliches Recht* marg note 675: only § 822 BGB; Koppensteiner and Kramer *Bereicherung* at 28 (where they mention § 822 'vor allem', but they give no other examples).

⁹³² See note 308 above.

envisaged by § 822 BGB,⁹³³ namely where C received the performance gratuitously.⁹³⁴ This paragraph stipulates that if B is enriched, and passes on the enrichment gratuitously to C, then C is liable for enrichment. It will be recalled that when A hands something to C in terms of an *Anweisung* from B, then A is regarded as performing to B (and B to C), rather than directly to C. In circumstances where there is no valid relationship between A and B, and A hands a sum of money to C, and this payment is gratuitous, the bank can proceed directly against C.⁹³⁵

It should also be borne in mind that A will have a direct action against C where there was no valid *Anweisung*.⁹³⁶ This applies whether or not there was a valid relationship between B and C.⁹³⁷ As said above, this point of view is justified as follows: firstly, there are no grounds for attributing the performance to B in such a situation as he gave no instruction at all and, secondly, C does not deserve protection because he did not receive the amount due to anything that B did but rather due to a mistake on the part of A.⁹³⁸

One may summarise the German position thus: if the relationships between A and B, and B and C, are both void, A will generally have to sue B, who must either cede his claim against C, or pay A the value of that claim. If, however, C received the performance gratuitously, or where B had not validly instructed A to make the performance, then A would be able to hold C directly liable in terms of the law of

⁹³³ See Appendix A.

⁹³⁴ See, e.g., Koppensteiner and Kramer *Bereicherung* 28.

⁹³⁵ It could be argued, however, that if there is a contract of donation between B and C (or an interest-free loan of money, or some other gratuitous transaction: see *Jauernig/Schlechtriem* § 822 marg note 5), the case would not be one of *Doppelmangel* (as there would be a valid legal ground between B and C). According to the majority view, the absence of a legal ground between B and C is not the same as a gratuitous transaction, for the purposes of § 822: see *Jauernig/Schlechtriem loc cit.*

⁹³⁶ See section 2 (c) above. Also see Meier (1999) 58 *Cambridge Law Journal* 567 at 571-2; Medicus *Schuldrecht II* marg note 729; *idem Bürgerliches Recht* 510 marg note 677; Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 34. There being no 'specific purpose in terms of the *Leistungsbegriff*' on the part of the bank vis-à-vis the payee, the claim would be some sort of *Nichtleistungskondition* rather than a *Leistungskondition*: Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 35.

⁹³⁷ See the text to note 670 above. Cases where there is no valid relationship between B and C, and no valid *Anweisung* B-A should strictly not be regarded as cases of *Doppelmangel* if there is a valid underlying contract between A and B.

⁹³⁸ Meier (1999) 58 *Cambridge Law Journal* 567 at 572.

unjustified enrichment.

South African law

Cases of *Doppelmangel* are understandably rare in practice. In the absence of appropriate South African case law, we can learn from German experience. The three approaches that have been favoured by German law at different stages are that A should sue C directly, that A should sue B for cession of his enrichment claim against C, and that A should sue B for the value of his enrichment claim against C. The third approach is regarded as the best way to achieve an equitable balance of the interests of the parties. Which, if any, of these approaches is followed by South African law?

If one applies the general principles of enrichment liability in South African law, one is led to the conclusion that A must sue C in cases of *Doppelmangel*. In such a situation, C would be enriched by A's payment. B, on the other hand, would not be enriched thereby, as he neither acquires an asset nor loses a liability. C would be enriched at A's expense: A, and not B, would be impoverished by the payment. There is no valid justification for A's payment to C, so C's enrichment would be unjustified.

This line of reasoning may be illustrated by the unreported case of *The Standard Bank v Haskins*, which was referred to above.⁹³⁹ In this case, there was a valid contract between A and B, but there was neither a valid instruction B–A nor a valid contract B–C. It thus strictly falls into the category of cases dealt with in section 2 (c) above. Certain aspects of the judgment are pertinent in this context, however.

As will be recalled, this case concerned Haskins (B), who made various transactions while insane. It appears that he was sane when he opened an account with Standard Bank, but that he became insane before entering into various agreements (B–C) and instructing Standard Bank (A) to make payments to C. The court held that the contracts with C and the instructions to A were invalid. On the question of his liability for enrichment, the court confirmed that a 'person who lacks contractual capacity

⁹³⁹

At pp 179.

because he is at the time of contracting of unsound mind may, if the other party to the void contract performs, nevertheless become indebted to another on the ground that he has been unjustly enriched at the latter's expense.⁹⁴⁰

The judge (Conradie J, as he then was) applied the general requirements for enrichment liability rather than any of the traditional remedies. His approach was similar to that of the Appellate Division/ Supreme Court of Appeal in cases such as *B & H Engineering*⁹⁴¹ and *ABSA v Standard Bank*,⁹⁴² in that he emphasised the enrichment-requirement.⁹⁴³ He said that B could only be enriched if the payment via the bank discharged a valid obligation to C (i.e. in such a case B would be enriched by losing a debt). If, however, the debt B–C is invalid, continued the judge, then C, and not B, would be enriched. He held that in this case B's debt to C was invalid because, if the instruction B–A was invalid due to B's insanity, then the debt B–C must have been invalid for the same reason.

Significantly, the bank's counsel argued that B was enriched by acquiring a right to sue C for enrichment. In other words, he employed an argument analogous to the German *Kondition der Kondition* (although he did not suggest that B should cede to A his claim against C) or to the German notion that B can be enriched by the value of a claim against C. The judge rejected this argument on the grounds that any enrichment requires a corresponding impoverishment and that one cannot argue that in such circumstances B was impoverished because '[h]e had no liability to the trader [C] and paid none'. The judge accordingly concluded that '[t]he creditor [C] was enriched at the expense of the applicant [A]. The applicant is the one who was impoverished by acting on a void instruction to discharge a non-existent debt.'⁹⁴⁴

⁹⁴⁰ At p 4 of the typewritten judgment, where the judge cited the following authorities for this rule: *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) at 456F; Grotius *Inleidinge* 3.30.3; Van Leeuwen *Censura Forensis* 1.4.3.2 and Van der Keessel *Praelectiones* 3.30.3.

⁹⁴¹ *Supra*.

⁹⁴² *Supra*.

⁹⁴³ Thus the question whether there were any valid obligations between A, B and C seemed to be of relevance only to the question of discharge (and therefore enrichment); the judge did not mention the *sine causa*-requirement.

⁹⁴⁴ See p 6 of the typewritten judgment.

In other words, the judge held that A could not sue its client, B, because the client was not enriched in that the bank's payment neither increased his assets nor extinguished his liabilities. He held, *obiter*, that in such circumstances it would be C who was enriched by the payment. The judge thus seemed to favour a direct action (A–C) in such circumstances.

Obviously, it should be borne in mind that this is not really a true case of *Doppelmangel*,⁹⁴⁵ but rather a case of a defective *Anweisung*. As was explained above, even German law agrees that A should have a direct action against C in such cases. As such, the case of *Haskins* cannot be regarded as authority for the view that A cannot sue B (and should sue C) in cases of *Doppelmangel*. It is significant, however, that the court met with the same sort of difficulties regarding the enrichment-requirement as those encountered in German discussions of *Doppelmangel*. It is indeed difficult to argue that A should sue B – according to our general principles of enrichment liability – in any situation where A's performance does not extinguish any obligation between B and C. The argument that A should sue B for the value of his claim against C would also encounter the same sort of objections raised in German law, e.g. that A would have no claim against B if B's claim against C (assuming that he had one) had become worthless.

It is also noteworthy that the court explicitly rejected the idea that B could be enriched by the acquisition of an enrichment claim against C. The flaw in this argument, from the perspective of the general principles of enrichment liability in South African law, is that B was not impoverished. In other words, C was not enriched at B's expense.⁹⁴⁶ B therefore did not acquire an enrichment claim against C, according to the judge's reasoning, so it cannot be argued that B was enriched in this way. This puts paid to the argument that A should sue B for cession of an enrichment claim against C (the

⁹⁴⁵ In other words, a situation where there is no valid underlying contract between A and B (although there might be a valid *Anweisung*), and no valid contract between B and C. In this case, there was a valid banker-client contract between A and B, but no valid instruction in terms thereof.

⁹⁴⁶ See De Vos *Verrykingsaanspreeklikheid* 2, as cited by the judge on p 4 of his judgment, and Chapter One at p 13. De Vos apparently adopted the 'at the expense of' requirement from German law (see *Verrykingsaanspreeklikheid* 339n1), which confines this requirement to *Nichtleistungskonditionen*, and does not apply it across the board. In this regard, see p 42 above.

Kondiktion der Kondiktion) and to the argument that A should sue B for the value of any such claim.

In *McCarthy Retail Ltd v Shortdistance Carriers CC*,⁹⁴⁷ the Supreme Court of Appeal suggested that if our law adopts a general enrichment action, such an action will have a subsidiary nature.⁹⁴⁸ In other words, it will probably not displace the traditional enrichment remedies, in their updated form. Let us imagine that Mr Haskins was insane when he opened a bank account at Standard Bank and concluded a contract with C, but that he recovered his sanity and then drew a cheque in C's favour, i.e. a true case of *Doppelmangel*. Or we could imagine that a bank terminates its contract with a client without giving the client the required notice, and the client writes a cheque in favour of a supposed creditor. Would the bank succeed with any of the traditional remedies?

The first remedy that comes to mind is the 'rag-picker' form of the *condictio sine causa specialis*. It was suggested above that this *condictio* should generally lie between parties linked by a *negotium*, except where something was received *ex causa lucrativa* or where A handed something to C in accordance with an instruction by B which was invalid. This would reflect the current German position (which in turn reflects Canaris's interest-based analysis): A can only sue B, and C can only be sued by B, unless C's acquisition was gratuitous (or there was no valid *Anweisung* B→A), in which case A would be able to sue C directly. The difficulty is that our courts tend to define the requirements of this *condictio* along the lines of the general requirements for enrichment liability, with the emphasis on the enrichment-requirement. This remedy would therefore fall prey to the same sort of objections that rule out a general action between A and B.

It seems, however, that the bank might have more success suing B with the *condictio indebiti*. A would have to prove that it made a *datio* to B, i.e. that it was the *solvens* and B was the *recipiens*.⁹⁴⁹ As suggested above, the notion of *delegatio solvendi*

⁹⁴⁷ 2001 (3) SA 482 (SCA).

⁹⁴⁸ See Chapter One at p 15.

⁹⁴⁹ See *Licences and General Insurance Co v Ismay supra*.

implies that A made a *datio* to B and that B made a *datio* to C in such circumstances, notwithstanding the fact that A actually handed the money directly to C. In other words, B's instruction to A to pay C (if free from defects),⁹⁵⁰ calls the fictional triangle with its double-*dationes* into being, and makes B the *solvens* and C the *recipiens* in respect of one *datio*, and A the *solvens* and B the *recipiens* of the other *datio*. This would imply that, provided that a *delegatio solvendi* can be valid in the absence of a valid underlying contract A-B⁹⁵¹ and that the error-requirement is satisfied, A would have a *condictio indebiti* against B,⁹⁵² and B would be entitled to a *condictio* against C: both A's *datio* to B, and B's *datio* to C would be *indebite* in cases of *Doppelmangel*. The traditional remedy avoids the obstacle faced by the general principles of enrichment liability, viz proof of enrichment and impoverishment – like the German *Leistung*, it focuses on the performance rather than the result thereof.

Another potential obstacle is the rule that the *condictio indebiti* only lies for the value of the recipient's enrichment where the recipient has parted with possession of what he received.⁹⁵³ According to the analysis suggested above, however, B does not part with what he has (fictionally) received. Provided that the *delegatio solvendi* is valid, A's payment to C in accordance with B's instruction constitutes two simultaneous – and not consecutive – performances (A-B and B-C).⁹⁵⁴

To sum up, then, it seems that South African law can accommodate two of the

⁹⁵⁰ In German law, as said above, the principles of separation and abstraction apply to the *Anweisung*. In other words, there can be a valid *Anweisung* in the absence of a valid underlying obligation. There is at least one situation in South African law where a bank is obliged to honour a cheque even though there was no valid underlying banker-client contract viz where a bank terminates its client's contract without giving due notice. See p 190 above.

⁹⁵¹ As implied by *Ismay's case supra*.

⁹⁵² See p 203 ff above, *Licences and General Insurance Co v Ismay supra* and *Minister van Justisie v Jaffer supra*.

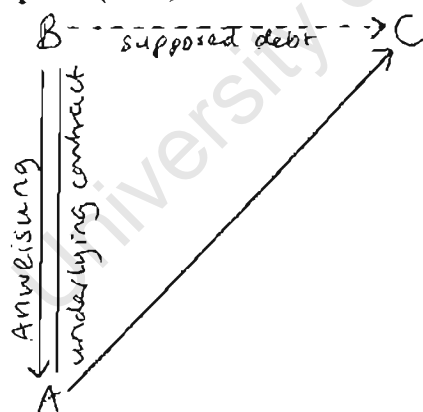
⁹⁵³ De Vos *Verrykingsaanspreeklikheid* 364 ff. See Chapter One at p 8.

⁹⁵⁴ This may best be explained by an example where all the legal relationships are valid. If I owe my landlord R3 000 and he instructs me to pay this sum directly to his creditor, C, and I do so, my payment to C constitutes two performances: performance in terms of my obligation to my landlord, and performance in terms of his obligation to C. It does not constitute one performance that is received by my landlord and then redirected to his creditor. The landlord thus cannot be seen as having 'parted with' my performance.

three German solutions mentioned above.⁹⁵⁵ According to the general principles, A should sue C. This is certainly the most straightforward approach, and the fact that it obviates the need for two actions might carry more weight in South Africa than in Germany, as our courts are already overburdened and litigation is ruinously expensive. On the other hand, it can also be argued that A could bring a *condictio indebiti* against B, and that B could similarly sue C. The advantage of this approach is that it confines parties to their 'causal relationships', with the result that nobody may be sued by, or exposed to the possible insolvency, defences, rights of retention or possibilities of set-off of someone with whom he has had no prior contact.

On balance, although our highest court is open to arguments based on policy⁹⁵⁶ and policy factors suggest that A should sue B and that B should sue C in cases of *Doppelmangel*, the current approach of the courts in banking cases⁹⁵⁷ suggests that a South African court is more likely to allow A to sue C directly than to require A to go 'via the triangle'.

- 4 While the legal relationship between the instructing and instructed parties (A–B) is valid, the relationship between the instructing party and the recipient (B–C, i.e. the *Valutaverhältnis*) is defective:



⁹⁵⁵ The only one of the three possible solutions mooted in German law that we cannot accommodate is the *Kondition der Kondition*, which Canaris regards as the worst from a policy perspective because it concentrates all the risks on one party (A). He says that the direct action A–C previously espoused by the majority allocated the risks incorrectly but at least it did not result in a cumulation of all the risks in A: Canaris (n 8) 811.

⁹⁵⁶ As in *B & H Engineering v First National Bank Ltd supra*.

⁹⁵⁷ For example, the court's emphasis on the enrichment-requirement, its preference for the *condictio sine causa* (rather than the *condictio indebiti*) in banking cases, and its definition of the requirements of this *condictio* as merely being that there must be enrichment that is *sine causa*.

In the situation to be considered in this section, the only defect⁹⁵⁸ lies in the legal relationship between the instructing party (B) and the 'recipient' of the 'performance' (C).⁹⁵⁹ As is shown by this diagram, the legal relationship⁹⁶⁰ between A and B has no defects. In short, A performs to C in accordance with B's instruction, in circumstances where B does not owe anything to C.

For example, B pays C by means of a cheque (drawn on Bank A, which accordingly debits B's account) in circumstances where an agreement between B and C is void. In terms of South African law, the agreement could be void on account of illegality, uncertainty, impossibility (of C's counter-performance), non-compliance with formalities, or because of *iustus error* or the absence of reasonable reliance on the appearance of consensus.⁹⁶¹ For example, after lengthy negotiations, B and C purport to conclude a contract in terms of which B pays R15 000 (by means of a cheque drawn on Bank A) for the purchase of C's horse, Dobbin. Unbeknownst to B and C, at the time of contracting, Dobbin had already died due to an equine virus. The contract is therefore void due to initial objective impossibility of performance.⁹⁶²

Or B could give a cheque to C, thinking that he has a statutory obligation towards C, where no such obligation exists. For instance, due to an error in a municipality's accounting department, B receives an account incorrectly stating that he owes the municipality R2 000 for outstanding rates. Unaware of the error, B writes a cheque for R2 000 and delivers it to the municipal offices. A honours the cheque and debits B's account in the corresponding amount.

⁹⁵⁸ In the sense that the relationship between B and C is either totally absent (see, e.g., *Bonitas Medical Aid Fund v Volkskas Bank Ltd and Another* 1992 (2) SA 42 (W)), void or voidable.

⁹⁵⁹ The words 'recipient' and 'performance' are used loosely here, merely for want of more accurate terminology; as was explained above, B could also be regarded as the recipient of a performance by A. For example, when A delivers something to C on B's instruction, A is regarded as performing simultaneously to B (in accordance with B's instruction) and to C (in terms of B's obligation to C). As one and the same act embodies two performances, there are accordingly two recipients.

⁹⁶⁰ Or 'relationships', if one regards the underlying contract and the instruction arising from it as two notionally distinct legal transactions.

⁹⁶¹ See Van der Merwe *et al Contract* 38 ff, 170 ff, 175 ff, 203 ff. Cf German law, in terms of which a contract based on error will be voidable rather than void – see § 119 BGB.

⁹⁶² It should be noted that this example would not be appropriate as an illustration of the German law: see the discussion of initial impossibility in Chapter Four.

Common sense suggests that because payment takes place without any hitch, there is no need to distinguish this case from one where the payment (B–C) was made in cash, and that it should be treated in the same way as an uncomplicated two-party relationship: the bank need not enter the arena and the only parties to be considered would be B and C. Both German law and South African law seem to reach this conclusion, albeit via different routes.

Regarding German law, it will be remembered that, because § 812 BGB only requires that the defendant ‘receive’ something (i.e. not that he be enriched in the South African sense),⁹⁶³ and does not require the plaintiff to prove that he was impoverished, the range of possible parties to an enrichment claim is potentially wider than it would be in terms of South African law. It is therefore necessary to consider the position of all the parties, and to assess the merits of possible claims ‘along each side of the triangle’.

German lawyers say that the *Deckungsverhältnis* (A–B) is insignificant in situations like the one presently being considered: A has achieved the purpose of his performance (*Leistungszweck*) in his relationship with B.⁹⁶⁴ In other words, no claim will lie between A and B. It is as if B had himself performed to C and, therefore, the view of the majority of German enrichment lawyers is that only B can bring an enrichment claim⁹⁶⁵ against C.⁹⁶⁶ A direct action A–C is accordingly not allowed:⁹⁶⁷ because the bank’s (A’s) intention was to perform to its client, the drawer (B), it cannot be said that it performed to the payee (C) and it therefore cannot claim directly from the payee.⁹⁶⁸ To allow such a claim (A–C) would also fly in the face of Canaris’s first principle viz that nobody should be able to rely on the invalidity of a ‘causal relationship’ to which he is not a party, or raise this invalidity against a third party who

⁹⁶³ See, e.g., *King v Cohen Benjamin & Co supra* at 650.

⁹⁶⁴ See Koppensteiner and Kramer *Bereicherung* 26-7.

⁹⁶⁵ A *Leistungskondition*: *Münchener Kommentar/Lieb* § 812 marg note 37

⁹⁶⁶ *Münchener Kommentar/Lieb* § 812 marg note 37; Zimmermann and Du Plessis 1994 *Restitution Law Review* 14 at 33; Loewenheim *Bereicherungsrecht* 35.

⁹⁶⁷ Except in the circumstances covered by § 822 BGB.

⁹⁶⁸ Wieling *Bereicherungsrecht* 84-5; Visser (n 13) 540. In general, not only a *Leistungskondition* but also the *Nichtleistungskonditionen* would be denied.

is not a party to the transaction.⁹⁶⁹ In other words, A cannot use the invalidity of the contract between B and C as a reason for suing C himself.

These arguments may be illustrated with the following example: if Alan owes Bill R150 and Bill asks Alan to give it to his (Bill's) creditor Craig, and Alan does so, and it then turns out that Craig was not really Alan's creditor, there is no reason why Alan should sue to get his performance back. There is also no reason why Alan should bear the risk that Bill's obligation to Craig was merely putative. Alan did what he was validly obliged to do, and he should not have to bear the risk of possible legal expenses, or of C's disappearance. After all, he did not contract with Craig and therefore never had the opportunity to assess his creditworthiness. Craig is only worthy of protection in that he should not be exposed to possible actions by two parties (Alan and Bill).

The conclusion that B should sue C would be reached by a South African lawyer, applying the general principles of enrichment liability. No enrichment claim would lie between A and B: A is neither enriched nor impoverished⁹⁷⁰ so could neither sue nor be sued on the basis of enrichment in these circumstances. There is also no question of a claim between A and C. Although C is enriched (having received a performance to which he was not legally entitled), A is not impoverished. The only impoverished party would be B, whose account at Bank A would be validly debited in the relevant amount. In other words, B would suffer either a loss of assets (assuming that his account had a positive balance) or an increase in liabilities (if the amount in his account was insufficient to cover the payment).⁹⁷¹

Could A sue C with one of the traditional remedies, such as a *condictio*? It might be possible to argue that A made a *datio* to C, in that it actually transferred the money to him or to his collecting bank, as his agent. I would submit, however, that this is

⁹⁶⁹ Also see Wieling *Bereicherungsrecht* 84-5.

⁹⁷⁰ Assuming that A was a bank and B its client, A would have a claim against B in respect of the amount paid to C – A would thus debit B's account. Moreover, no claim could lie between A and B because they are linked by a valid *causa* e.g. a banker-client contract.

⁹⁷¹ In other words, the payment resulted in the overdrawing of his account, or the increase of an already existing overdraft, or the bank granted him some other sort of credit.

incorrect. In identifying a *solvens* or a *recipiens* (and therefore the 'route' of the *datio*), one cannot look at the parties in isolation.⁹⁷² To say that A transferred ownership of something (in this case, money) and is therefore the *solvens*, is to look at only part of the picture. As explained above, our law recognises that the *recipiens* may be someone other than the party who actually physically receives payment.⁹⁷³ In these circumstances, C (and not the collecting bank) is legally regarded as the *recipiens* because the collecting bank was acting as C's agent. It would be strange if the law were to accept that the *recipiens* could be someone other than the person who actually received the *datio*, and not that the *solvens* could be someone other than the person who actually made the transfer. Here, A made the transfer of money on B's behalf, under his instruction, and B should therefore be regarded as the performing party (the *solvens*) in law.⁹⁷⁴ The *datio* must therefore have been made by B to C, and A cannot sue C with any of the *condictiones* for which a *datio* is a requirement.⁹⁷⁵

This is not to say that C would not be liable in terms of a *condictio*. If we regard B's handing over of the cheque to C as a *datio* by B to C, as suggested above, then B should be able to bring one of the *condictiones* against C. Which one would be appropriate would depend upon the circumstances, including the reason for the invalidity of a purported contract between B and C.

If B gave the cheque to C in terms of a contract that was void, the payment would be unowed and the *condictio indebiti* would be available to B provided that he

⁹⁷² See, e.g., *King v Cohen Benjamin & Co supra* at 650; *Trahair v Wehh & Co supra*, particularly at 232 and 234.

⁹⁷³ See, e.g., *Licences and General Insurance Co v Ismay supra*; *Minister van Justisie v Jaffer supra*; *Phillips v Hughes*, *Hughes v Maphumelo supra* and the discussion above at p 203 ff and p 303 ff.

⁹⁷⁴ See *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd supra* and note 846 above.

⁹⁷⁵ In other words, the *condictiones indebiti* (see Lotz (n 859) para 79), *causa data causa non secuta* (para 85), *ob turpem vel iniustam causam* (Lotz (n 859) para 83) and the *condictio sine causa* except where someone 'bona fide disposed of or consumed the property of another if ... he obtained possession otherwise than through [a *datio*⁹⁷⁵ between himself and the owner] ... and the property consisted of a sum of money which was received *ex causa lucrativa*': see Lotz (n 859) para 88; *Trahair v Webb & Co supra*; *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N).

could prove that he made the payment due to an excusable error.⁹⁷⁶ As mentioned above, the contract could be void on the basis of a *iustus error*, a lack of reasonable reliance upon consensus, initial objective impossibility of any counter-performance (i.e. performance by C), vagueness, or non-compliance with formalities.⁹⁷⁷

If the contract between B and C were an illegal one, then B could sue C with a *condictio ob turpem vel iniustam causam*, provided that his claim would not be barred by the *par delictum* rule.⁹⁷⁸ Imagine, for example, that B is a pensioner who takes expensive medication for a chronic illness. He is unaware that new rules regarding medicine prices have made it illegal for a pharmacist to continue charging him so much for the drugs, and he accordingly gives a pharmacist C a cheque for much more than the legal maximum. Assuming that the illegality would taint his contract with C, he could sue C with a *condictio ob turpem vel iniustam causam*. If, however, he knew that the price had been brought down and colluded with the pharmacist to defraud his medical aid scheme, for example, then he and the pharmacist would arguably be acting *in pari delicto* and his claim would be barred.

The *condictio causa data causa non secuta* would be available to B if, for example, he gave a cheque to a property developer (C) as a deposit, on the assumption that C would obtain planning permission to build a house for B, and that permission did not materialise.⁹⁷⁹ The *condictio sine causa*, on the other hand, would be the appropriate choice if B gave the cheque to C on the assumption that C had already obtained planning permission.⁹⁸⁰

This *condictio* would also be available to B if he and C had a valid contract

⁹⁷⁶ For the requirements of the *condictio indebiti*, see Lotz (n 859) para 79. Also see Chapter One at p 8 above.

⁹⁷⁷ Apart from non-compliance with the formal requirements of the Alienation of Land Act 68 of 1981, which provides its own enrichment remedy: see Chapter One at pp 11-12.

⁹⁷⁸ See Lotz (n 859) para 83 and Chapter One at p 8.

⁹⁷⁹ Or if the payment was made as a consequence of a *modus* which was 'disregarded or frustrated': see Lotz (n 859) para 85 and Chapter One at p 8.

⁹⁸⁰ In other words, 'a false assumption relating to a fact concerning the past or present': see Lotz (n 859) para 88.

which subsequently fell away.⁹⁸¹ B might also be able to sue C with a *condictio sine causa* where, for example, C had come into possession of cheque made out by B, other than by way of a *datio* by B, and had *bona fide* disposed of it, provided that C had not made any counter-performance therefor and provided that a cheque would be regarded as 'money' for the purposes of this action.⁹⁸²

While this all seems quite straightforward, the kind of complications that arise in practice may be illustrated by the case of *Commissioner for Inland Revenue v Visser*.⁹⁸³

⁹⁸¹ See Lotz (n 859) para 88 for the circumstances in which this *condictio* would be available. Also see Chapter One at p 9.

⁹⁸² Cf p 305 ff above.

⁹⁸³ *Supra*. Also see *Bonitas Medical Aid Fund v Volkskas Bank Ltd and Another supra*. In this case, Bonitas, a medical aid fund with a healthy bank balance, wished to invest R2 000 000 in Volkskas Bank. The appropriate Bonitas employees therefore drew a cheque for this amount on the fund's bank, Nedbank. The cheque was made out to Volkskas, it was crossed and marked 'not transferable', and the printed words 'or bearer' were deleted. A Mr Adams, presumably acting as the agent of a company called Euro Trust, managed to persuade one of Bonitas's employees to allow him to convey the cheque to Volkskas. On its way to Volkskas, the cheque took a little detour via the offices of Euro Trust. One of Euro Trust's employees filled in a deposit slip on which she listed several cheques (presumably made out to Euro Trust) and she included Bonitas's cheque in favour of Volkskas in this list. The cheques and the deposit slip were handed in at a branch of Volkskas Bank on the same day. The teller stamped the date on the cheque and sent it on its way. Euro Trust's account was credited with the R2 000 000 and the cheque arrived at the automated clearing bureau. Because the inter-bank agreement between Volkskas and Nedbank stipulated that cheques bearing the date stamp of the collecting bank were to be accepted as having been correctly negotiated, Nedbank paid Volkskas, and debited Bonitas's account accordingly. The 'financial adventures' of the mastermind behind Euro Trust having drawn to a close, the company was liquidated. (For the facts, see the judgment at 43-6.) In other words, B (Bonitas) had a valid underlying contract with its bank A (Nedbank), and validly instructed A by means of a cheque to pay R2 000 000 to Volkskas. The money was, however, paid into the account of C (Euro Trust) held at Volkskas. So the relationships between A and B were valid but the relationship between B and C (the *Valutaverhältnis*) was 'defective' in that B owed C no obligation at all. The case concerned the delictual liability of Volkskas, whose employees had all ignored the various protective measures taken by Bonitas (the crossing etc). (See the judgment at, e g, 46B, 46C-D, 47F and 48A.) The judge stated that 'Volkskas ignored the fact that it was the payee of the cheque. It acted throughout as the agent of Euro Trust. In my view it was at all times therefore acting as the collecting banker and its liability must be determined in the light of this fact.' (See 47F-G.) The court went on to hold that '[b]ecause Volkskas did not accept the cheque as payee, ... [Bonitas], as the drawer, remained the true owner of the cheque' (at 47G-H). The court held that the bank's employees had 'constructive knowledge that the proceeds of the cheque were being applied to the credit of a person not entitled thereto in terms of the instrument itself' and that a breach of trust had therefore been committed. (See 49C-E) The actions of Volkskas's employees were held to be the cause of Bonitas's loss and the Volkskas bank was accordingly found liable in terms of the law of delict. At 49-50, the court held that there was no contract between Bonitas and Volkskas and that Bonitas could not sue Volkskas for unjustified enrichment as Volkskas had not been enriched. As far as the law of enrichment is concerned, Bonitas should have had an enrichment claim against Euro Trust as it was unjustifiably enriched at Bonitas's expense. Such a claim

Visser (B), a shoemaker from Parow, was told by his bookkeeper (Van Zyl) that he owed a sum of money to the Receiver of Revenue (C). Visser accordingly drew a cheque for this sum on his bank (A), in favour of C, and handed it to his bookkeeper for delivery to the offices of the Receiver. Visser in fact did not owe the Receiver anything at all. Van Zyl then used the cheque to pay an amount owed to C by one of his other clients, Ras, and was reimbursed for this payment by Ras's wife. Visser sued C with a *condictio indebiti*. The court *a quo* decided that Visser had paid the amount in question to the Receiver of Revenue 'in respect of a debt he did not owe' and granted his claim.⁹⁸⁴

In other words, the court treated the case as one where there was a valid *Deckungsverhältnis* (between Visser and his bank) but an invalid *Valutaverhältnis* (between Visser and the Receiver): the defect in question lay in the relationship between B and C in that B did not owe the money to C. Because there was no defect in the relationship between A and B, the fact that payment was made by cheque was irrelevant. B's underlying contract with the bank was valid, the cheque was validly made out, and A performed properly in accordance with the instruction from its client embodied in the cheque.

The Commissioner for Inland Revenue appealed against this decision. The Appellate Division, per Hoexter JA, held that '[t]he payment which took place was a payment by van Zyl of the £1,713 10s. 0d. actually owed by Ras to the defendant. There was therefore no payment by the plaintiff of his own supposed debt and the money received by the defendant from van Zyl was not *indebitum*.'⁹⁸⁵

The court thus did not regard the payment as being a payment by Visser to the Receiver. It was considered to be a payment by Van Zyl to the Receiver, in settlement of Ras's debt to the latter. In other words, it appears that the court regarded this as a

⁹⁸⁴ would have been useless in the circumstances, however, as Euro Trust had been liquidated.
⁹⁸⁵ See the judgment at 457F.
 See 457H.

Chapter Two-type situation, i.e. a situation where someone paid the debt of another of his own accord: Van Zyl paid the debt owed by Ras to the Receiver.⁹⁸⁶ As Ras did owe the amount in question, the court said that the payment was not made *indebite*. For these reasons, the court held that Visser's *condictio indebiti* against the Commissioner for Inland Revenue should fail.⁹⁸⁷

The court's analysis rests on the conclusion that Van Zyl's delivery of the cheque extinguished Ras's liability to the Receiver. The court thus assumes that payment by means of a stolen cheque can validly extinguish a debt. This assumption cannot be supported, for reasons of public policy. As was suggested above, payment by means of a stolen or forged cheque should not have the effect of extinguishing a liability.⁹⁸⁸ It may be convenient to regard the delivery of a stolen cheque⁹⁸⁹ as valid payment, and such an approach protects the payee's reliance interest. These factors are, however, in my view, outweighed by the need to protect the drawer's interests and the fact that the law should not be seen to condone fraudulent payments.⁹⁹⁰

I accordingly prefer the decision of the court *a quo*. Van Zyl's delivery of the cheque should not have extinguished Ras's debt and the Commissioner should therefore have retained its claim against Ras. The payment by Visser's bank was attributable to Visser as it took place in accordance with his valid instruction. Visser thus paid a non-existent debt in error and I think that his *condictio indebiti* against the Commissioner should have succeeded. The Commissioner should have been able to claim payment by Ras, and Ras should have had to sue Van Zyl for the amount by which he was enriched.

In conclusion, therefore, where a contract B–C is void, B should be able to bring an enrichment claim against C for recovery of a payment validly made by A under B's

⁹⁸⁶ According to this analysis, Van Zyl (A) acted as a *mala fide gestor* by settling Ras's (B's) debt to C for his own benefit. A thus had a claim to the amount by which B was enriched (i.e. the amount of the debt that had been settled). B accordingly handed this sum to A.

⁹⁸⁷ 458B–C and 459E.

⁹⁸⁸ See p 289 above.

⁹⁸⁹ Like the delivery of stolen cash.

⁹⁹⁰ Cf p 290 above. In result, the case of *East Coast Design supra* suggests that payment by means of a forged cheque should not validly extinguish a debt.

instruction.

A NOTE ON VOIDABLE CONTRACTS

In German law, there is no difference between a voidable contract that has been avoided by the aggrieved party and a contract that is void *ab initio*.⁹⁹¹ In other words, rather than attracting contractual or delictual remedies, a voidable contract, once avoided, would be treated in exactly the same way as a contract which was void from the outset: a party who has performed may reclaim such performance in terms of the law of unjustified enrichment.

In South Africa, on the other hand, if the contract between B and C were voidable (eg on the basis of fraudulent misrepresentation) and the aggrieved party chose to avoid the contract (with retrospective effect), this would be followed not by an enrichment claim but by *restitutio in integrum*. Whether he affirmed or rescinded the contract, he would be entitled to a claim for delictual damages to the extent that he had still suffered a loss and provided that the misrepresentation, duress or undue influence was fraudulent or negligent.⁹⁹²

The same rules would apply if the underlying contract between A and B were voidable, or if both contracts (A–B) and (B–C) were voidable. The parties would be confined to seeking recourse against their contract partners and there would be no claim to *restitutio in integrum* between A and C.

CONCLUSION

What, then, can one conclude about enrichment in the context of an instruction? The first situation considered was the one where B validly owes a performance to C,⁹⁹³ and

⁹⁹¹ See pp 19–20 in Chapter One above.

⁹⁹² For criticism of the rather anomalous exclusion of the *restitutio in integrum* from the law of unjustified enrichment, see S Hutton 'Restitution after breach of contract: Rethinking the conventional jurisprudence' 1997 *Acta Juridica* 201.

⁹⁹³ In this section, unless indicated otherwise, the word 'performance' will not be used in a technical sense i.e. to refer to a *Leistung*.

A makes that performance to C without realising that there is a defect in his (A's) relationship with B.

Assuming that there was no underlying contractual relationship between A and B, German law would say that A can bring an enrichment claim against B for the value of his claim against C. In an analogous case in South Africa,⁹⁹⁴ it has also been held that A can sue B for his enrichment. In that case, the judge distinguished such cases from the type of situation dealt with in Chapter Two and, importantly, he extended the notion of a *datio* by holding that although a payment had factually been made to C, it legally constituted a payment to B. In other words, where B instructs A to perform to his creditor, C, and A does so thinking that he owes this performance to B, A should sue B, and not C, for enrichment. Using its traditional remedies, South African law thus arrives at the solution that German law has derived from a close analysis of the interests of the parties.

Next, I discussed the law concerning payments made by A to C despite B's revocation of his instruction. German law distinguishes between cases where the payee was aware of the countermand, and those where he was not. It is suggested that we adopt this valuable distinction.

In cases where the payee was not aware of the countermand, both German and South African law only allow A to bring an enrichment claim against B. This conclusion can be explained on technical grounds. For example, A's payment to C constitutes B's performance in terms of his obligation to C and, as the obligation B–C is thereby extinguished, B is enriched. It can also be justified by an analysis of the interests of the parties. In result, the *bona fide* payee's reliance interest is protected by both legal systems in such cases.

If, on the other hand, the payee was aware of the countermand, A can bring an enrichment action directly against C. Both German law and South African law have

⁹⁹⁴ *Licences and General Insurance Co v Ismay supra*.

arrived at this conclusion by considering the interests of the parties. Thus, for example, the bank should carry the risk that it might make such a mistake, the recipient's reliance is not worthy of protection as he knew that he was not entitled to the performance in question, and so on.

According to the view now accepted by the majority in Germany, A can also bring an enrichment claim directly against C where there was no valid instruction for the payment A–C. This conclusion, too, is supported by an analysis of the interests of the parties: B is deemed to be more worthy of protection than C in such cases, whether or not C was aware of the absence of a valid instruction. The payment should not be imputed to B (in the absence of a valid instruction B–A), and should therefore not extinguish any debt owed by B to C. In cases where there is no valid instruction B–A, it is therefore irrelevant whether B owed anything to C or not.

South African courts apparently agree that A should not be able to sue B in such circumstances. There is authority for the proposition that A should sue C in cases where the instruction was defective (e.g. where too much was paid, or where the cheque was forged). On the other hand, there is also authority for the view that A should direct an enrichment claim against the forger of a cheque. An analysis of the interests of the parties and the relevant policy factors leads one to the conclusion that, as in German law, a payment made by A to C in the absence of a valid instruction by B should not extinguish any debt owed by B to C, whether or not C was aware of the absence of such an instruction. C should thus be regarded as being enriched by A's payment. As in German law, C's interests are sufficiently protected by the rules regarding loss of enrichment.

If only the *Valutaverhältnis* is defective, B will have an enrichment claim against C in terms of German law. It was suggested in this chapter that this is also the basic approach of South African law.

Cases of *Doppelmangel* (i.e. where both the relationships between A and B, and

B and C are defective) have led to controversy in German law. The currently-accepted view is that claims should lie between A and B, and B and C.⁹⁹⁵ This results in the most equitable allocation of risks. It is agreed that A may sue C directly, however, where C received the performance gratuitously.⁹⁹⁶ It appears that South African law, on the other hand, would more readily grant A a direct action against C. According to the general principles of enrichment liability, A would have to sue C, as B was arguably not enriched in such circumstances. It may be possible, however, for A to sue B with one of the traditional remedies (the *condictio indebiti*), although a South African court is presently more likely to allow A to sue C.

In the next chapter, performances in the context of an actual or purported cession will be considered. Whereas, in this chapter, the factor resulting in the 'deflection' of A's performance from B to C lay between A and B, the next chapter deals with situations where that factor lies between B and C.

⁹⁹⁵

Medicus *Bürgerliches Recht* marg note 675; Meier 58 *Cambridge Law Journal* 567 at 571.

⁹⁹⁶

In other words, in circumstances covered by § 822 BGB. But in the case of the complete absence of an effective instruction, there could be a direct claim between A and C: see Medicus *Schuldrecht II* 355 marg note 729; idem *Bürgerliches Recht* marg note 677. There is also authority to suggest that there could be such a direct claim where a bank has not obeyed an instruction to stop a cheque: Medicus *Bürgerliches Recht* marg note 676. These cases will be discussed in detail later.

CHAPTER FOUR

UNJUSTIFIED ENRICHMENT IN THE CONTEXT OF AN ACTUAL OR PURPORTED CESSION

The second chapter of this thesis dealt with situations where A performs in terms of B's obligation to C without having been instructed or otherwise obliged to do so. For example, A pays her sister's debt to C in order to bring her back from the brink of bankruptcy. In the next chapter, we discussed situations where A performs in terms of B's obligation to C on the instruction of B. Thus, for instance, on the instruction of its client (B), a bank (A) pays C. Now we have to examine the potential patterns of liability that emerge when A 'performs' to C in terms of a debt previously owed by A to B, but now owed by A to C. This situation would arise if, for example, A owed B a performance in terms of a contract and B ceded or purported to cede his claim against A to C.

Looking at this picture from a slightly different angle, Chapter Two covered situations where A acted on his own initiative in 'performing'¹ to C, whereas in Chapter Three A was prompted to 'perform'² to C by B's instruction. In this chapter, on the other hand, we will consider situations where A is prompted to 'perform' to C by B's cession³ to C of his claim against A.

Following the pattern of previous chapters, the South African⁴ and German⁵

¹ The word 'perform' is used here in a non-technical sense, to denote situations where A either gives something (*datio*) to C or does something (*factum*) for him, as we have no word that exactly corresponds to the German 'zuwenden' or 'Zuwendung', which covers both a *datio* and a *factum*: see the discussion in Chapter One at p 39 above.

² It should be emphasised again that this word is being used in an untechnical way (i.e. not as a translation of the German 'leisten') as it will be remembered that the *Zuwendungen* and *Leistungen* do not necessarily coincide: cf the discussion in Chapter Three, where it was pointed out that a *Zuwendung* A–C in accordance with an *Anweisung* B–A is regarded by German law as a *Leistung* A–B (and a simultaneous *Leistung* B–C).

³ Or his purported cession.

⁴ See, generally, Scott *Cession*; Hutchison (ed) *Wille's Principles* 491 ff; D J Joubert *General Principles of the Law of Contract* (1987) 190 ff; De Wet and Van Wyk *Kontraktereg* 251 ff; Van der Merwe *et al Contract* 419 ff; P M Nienaber 'Cession' *LAWSA* vol 2, First Reissue

law of cession in general will first be compared, to provide a background for an analysis of the particular instances of enrichment liability which arise in this context.

CESSION: A BRIEF COMPARISON

In essence, the ways in which the two legal systems treat cession are remarkably similar. In both systems, cession⁶ constitutes an act of transfer⁷ of an incorporeal object⁸ by a cedent to a cessionary. Analysis of the legal transactions involved in a cession may be facilitated by comparing cession to the other type of legal transfer recognised by the two legal systems, namely a transfer of corporeal property.⁹

Two requirements must be met in order for a transfer of ownership of corporeal property to take place, the first being physical delivery of movable property or registration of immovable property. The second requirement, which is not as immediately apparent, is the coincidence of the parties' intentions to pass and

(1993) paras 129 ff. On the historical background of cession in both systems, see Zimmermann *Law of Obligations* 58 ff.

⁵ §§ 398 ff BGB.

⁶ Cf 'assignment', which in South African law is the means by which a third party acquires not only rights but also duties and which is effected by the consent of all three parties, i.e. by the conclusion of an entirely new contract: Hutchison (ed) *Wille's Principles* 497. Also cf delegation and subrogation; Van der Merwe *et al Contract* 422. Although the word 'cession' is sometimes erroneously used in practice to denote a simultaneous cession and delegation, the two concepts are legally distinct (see, e.g., *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187, referring to a written contract ('... in spite of its title, it is not a cession but rather a contract of substitution incorporating a cession of rights and a delegation of obligations.').); *Milner v Union Dominions Corporation (SA) Ltd and Another* 1959 (3) SA 674 (C) at 676-7. One of the important facets of this distinction is that while the debtor need not consent to the cession of a claim against him, 'obligations may not be delegated by a debtor without the consent of the creditor': *Milner v Union Dominions Corporation (SA) Ltd and Another supra* at 676F.

⁷ In Afrikaans: 'oordragshandeling'; in German: 'Verfügungsgeschäft'. See, for example, *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 330H *in fin*-331A; *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) at 814J; *Headleigh Private Hospital (Pty) Ltd v/a Rand Clinic v Soller & Manning Attorneys and Others* 2001 (4) SA 360 (W) at 366G-H.

⁸ In other words, a real or personal right: Hutchison (ed) *Wille's Principles* 491. Cf Van der Merwe *et al Contract* 419 who only refer to a personal right in their definition of cession. Note that while the type of right most commonly ceded is a personal right, real rights are also capable of being ceded: see Nienaber (n 4) para 226 (and see, e.g., the comments in *Banjo v Sungrown (Pty) Ltd* 1969 (1) SA 401 (N) at 408B-C) but cf *Scott Cession* 7, 8 and 16 ff. A servitude, or a right in terms of a mortgage, or even ownership (see, e.g., *Van Zyl v Credit Corporation of South Africa Ltd* 1960 (4) SA 582 (A) at 587C but cf Nienaber (n 4) para 230n5) may thus be ceded.

⁹ See e.g. Van der Merwe *et al Contract* 421: '[C]ession is akin to delivery, by which transfer of ownership in a corporeal asset is effected'. See, e.g., *Johnson v Incorporated General Insurances Ltd supra* at 330-1.

to receive ownership.¹⁰ This so-called 'real agreement' is distinguished from any underlying ('obligatory') agreement in terms of which the transfer takes place,¹¹ such as a contract of sale or donation. The two agreements are also independent of each other in the sense that the validity of the real agreement is not dependent on the validity of the obligatory agreement.¹² Ownership of a car, for example, may thus be validly transferred even if the underlying contract of sale is void.

If the parties want to transfer a personal right, on the other hand, there can be no physical delivery as the object of the right (namely a performance) is incorporeal.¹³ All that is therefore required for the transfer of rights other than ownership, in both South African¹⁴ and German law,¹⁵ is agreement.¹⁶ This agreement (the 'transfer agreement', i.e. the coincidence of the *animus cedendi* and *animus acquirendi*)¹⁷ on its own effects the transfer of the right,¹⁸ or cession.¹⁹ The

¹⁰ C G van der Merwe *Sakereg* 2 ed (1989) 306.

¹¹ Thus both systems apparently apply the 'separation principle' (*Trennungsprinzip*). In this regard, see Chapter One above.

¹² Both the South African and German legal systems thus generally apply the principle of abstraction (*Abstraktionsprinzip*): On South African law: *Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369, especially at 398-9 and 411; *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A), particularly at 301H-302I (where the judge very clearly states that the transfer of ownership is independent of any underlying contract); *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstien en 'n Ander* 1980 (3) SA 917 (A); *Rabinowitz and Another v De Beers Consolidated Mines Ltd and Another* 1958 (3) SA 619 (A); Van der Merwe (n 10) 16 ff and 306 ff; D L Carey Miller *The Acquisition and Protection of Ownership* (1986) 124 ff and 167 ff. On German law, see, e.g., H Brox *Allgemeiner Teil des BGB* (22 ed 1998) marg notes 115 ff (where the author says that it has been suggested that if the two agreements form an economic unity, the abstraction principle will not apply (rejected by Brox): marg note 120.) It appears that if the underlying agreement is tainted by fraud, the abstraction principle will also not apply in German law: see Chapter One at p 19 above.

¹³ See Nienaber (n 4) para 227.

¹⁴ On the South African law of cession, see the references cited in note 4 above.

¹⁵ See §§ 398 ff BGB and the standard commentaries thereon. The first sentence of § 398 reads as follows: 'Eine Forderung kann von dem Gläubiger durch Vertrag mit einem anderen auf diesen übertragen werden (Abtretung).' (A claim can, by contract with another, be transferred from the creditor to the other party (cession).) It should, however, be remembered that if the underlying agreement is subject to fraud or mistake or is *contra bonos mores*, the transfer agreement will also be thus tainted: see Chapter One at p 19 above.

¹⁶ German law: Kropholler *BGB* vor § 398 marg note 3. South African law: see, e.g., *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) 873E-F; *Johnson v Incorporated General Insurances Ltd supra* at 331G-H; *Muller N O v Trust Bank of Africa Ltd and Another* 1981 (2) SA 117 (N) at 125F-G; Nienaber (n 4) para 227; Hutchison (ed) *Wille's Principles* 491. It may be express or tacit: Van der Merwe *et al Contract* 428.

¹⁷ In other words, the cedent's intention to cede and the cessionary's intention to receive. See, for example, *Hippo Quarries (Tvl) (Pty) Ltd v Eardley supra* at 873E-F; *Johnson v Incorporated General Insurances Ltd supra*, particularly at 331G-H; Nienaber (n 4) para 249; Van der Merwe *et al Contract* 428 and the authorities cited there in note 63. This transfer agreement corresponds to the 'real agreement' which, together with delivery or registration, effects transfer of corporeal property.

¹⁸ See *Uxbury Investment (Pty) Ltd v Sunbury Investments (Pty) Ltd* 1963 (1) SA 747 (C) at

main result is that the recipient, the cessionary, takes the place of the original creditor, the cedent, in his legal relationship with the debtor.²⁰

The cession itself can thus be seen as the conceptual parallel of transfer of ownership.²¹ As in cases where parties transfer corporeal property, at least in theory, the parties usually²² conclude two distinct, independent agreements: the agreement to cede (the 'obligatory contract')²³ and the agreement of transfer (the cession itself).²⁴ The first (e.g. a contract of sale or donation)²⁵ gives rise to the obligation to effect a cession, and the cession itself constitutes the performance of this obligatory agreement.²⁶ Thus, for instance, if B has a right against A (arising, for

¹⁹ 752A: 'A cession is a method of transferring incorporeal rights from one person to another'. Cf 'assignment', which in South African law is the means by which a third party acquires not only rights but also duties and which is effected by the consent of all three parties, i.e. by the conclusion of an entirely new contract: Hutchison (ed) *Wille's Principles* 497.

²⁰ See, for example, Nienaber (n 4) para 263; *Hippo Quarries (Tvl) (Pty) Ltd v Eardley supra* (also per Nienaber JA) at 877H-I: 'the cedent is succeeded by the cessionary as the holder of the right; and the cedent retains no interest in the right itself'; *Kotosopoulos v Bilardi* 1970 (2) SA 391 (C) at 396A and 398F-G; *Scott Cession* 128 ff and 221 ff. As far as 'absolute' cession is concerned, see Hutchison (ed) *Wille's Principles* 495. He thus receives a right which is generally neither greater nor lesser than the cedent had; *nemo plus iuris ad alium transferre potest quam ipse habet*. In the case of cession *in securitatem debiti*, according to the traditional approach, 'ownership' of the right is retained by the cedent whereas, according to the minority view, the cessionary receives the right but is obliged to transfer it back to the cedent if the latter pays the debt secured by the cession: Hutchison *op cit* 496. Regarding German law: § 398 BGB '[Abtretung] Eine Forderung kann von dem Gläubiger durch Vertrag mit einem anderen auf diesen übertragen werden (Abtretung). Mit dem Abschlusse des Vertrags tritt der neue Gläubiger an die Stelle des bisherigen Gläubigers.' (A claim can, by a contract with another, be transferred from the creditor to the other party (cession). With the conclusion of the contract, the new e.g. creditor steps into the place of the former creditor.)

²¹ See, e.g., the judgments of Joubert JA in *First National Bank of SA Ltd v Lynn NO and Others* 1996 (2) SA 339 (A) at 345G and *Johnson v Incorporated General Insurances Ltd supra* at 330H.

²² In other words, assuming that the *causa* for the cession was a contract and not, for example, a testamentary disposition.

²³ Namely an agreement 'whereby one or more obligations are created, such as contracts of sale, lease and donation': Nienaber (n 4) para 228. In Afrikaans, 'verbintenisskeppende ooreenkoms'. It is sometimes referred to as a '*justa causa*': see, e.g., *Johnson v Incorporated General Insurances Ltd supra* at 331G-H; *Hedgeleigh Private Hospital (Pty) Ltd v Rand Clinic v Soller & Manning Attorneys and Others supra* at 370C-D.

²⁴ In Afrikaans, 'oordragsooreenkoms'. In German law, it is regarded as an 'abstrakter Verfügungsgeschäft', i.e. it is analogous to the 'real agreement' that effects transfer of corporeal property. On the South African law, see e.g. *Johnson v Incorporated General Insurances Ltd supra* at 331G-H; *Hippo Quarries (Tvl) (Pty) Ltd v Eardley supra* at 877G. Some writers refer to this agreement 'whereby rights are transmitted' as a 'real' agreement: see Nienaber (n 4) para 228.

²⁵ *Johnson v Incorporated General Insurances Ltd supra* at 331H; Palandt § 398 marg note 3; Kropholler BGB vor § 398 marg note 2. The cession could also be made as a form of security analogous to a pledge of movables, in which case it would be a cession *in securitatem debiti*: Hutchison (ed) *Wille's Principles* 496; Zimmermann *Law of Obligations* 65; Zweigert and Kötz *An Introduction to Comparative Law* 3 ed (1998) 445-6.

²⁶ Nienaber (n 4) para 230: '[T]he two types of juristic acts are distinct in function and can be so in time: by the former a duty to cede is created; by the latter it is discharged'.

example, from a contract of lease), he may agree to 'sell' this right, or *res incorporalis*, to C. The agreement to sell the right would constitute an obligatory agreement to cede, and the envisaged performance would be the cession itself. The cession would occur once B and C have concluded an agreement of transfer (i.e. once B's intention to cede and C's intention to accept cession coincide).²⁷

These two agreements may occur simultaneously or chronologically.²⁸ Because they often coincide and are often difficult to distinguish in practice,²⁹ some South African authorities³⁰ have tended to regard them as one legal act.³¹ It now seems to be generally accepted, however, that, as in German law, they are at least conceptually distinct.³² The practical consequence of this theoretical distinction is that the validity of the two agreements may be assessed independently of one another, as is done in German law, which applies the principle of abstraction to conveyances of personal rights just as it does to conveyances of corporeal property.³³ In South Africa, while certain cases seem to support the causal system,³⁴ the weight

²⁷ If, for example, B in fact had no valid right against A (i.e. there was no incorporeal object to be ceded), the purported cession would have no effect (in German terms, it would 'gehen ins Leere', i.e. disappear into a void) and the underlying contract would thus not be fulfilled. The disappointed 'cessionary' would therefore be entitled to a claim for breach of contract. Cf. Muller's case *supra* at 125H (regarding cession of a *spes*): 'it is more correct to say that the obligatory agreement of cession can be entered into before the right of action has come into existence but not the real agreement of cession whereby effect is given to the obligatory agreement'. Also see the judgment at 128G.

²⁸ For example, see *Johnson v Incorporated General Insurances Ltd supra* at 331H; Muller's case *supra* per Thirion J at 126E: 'I can see no objection to the parties' entering into an agreement (the obligatory agreement) to cede a right not yet in existence but which may come into existence at some future date'. Also see Nienaber (n 4) para 230 and Scott *Cession* 8.

²⁹ See, for example, *Kalil v Devotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 974H-I where the court seemed to accept that there was a distinction, albeit a fine one, between the cession and the agreement to cede, but did not distinguish them with regard to the facts of the case. They could both be embodied in the same document – see, e.g., *Standard General Insurance Co Ltd v SA Brake CC supra* at 814I-J.

³⁰ See Muller's case *supra* at 125H-126A, where Thirion J mentions this difference of opinion. He favours the view that the term 'cession' refers only to the transfer.

³¹ The rules that a cession can take place for reasons other than that it has been contractually agreed upon, and that the parties can agree that a cession take place at a future date would seem to render this impossible.

³² See, for example, Nienaber (n 4) paras 228 and 249; Scott *Cession* 8 ff, 24 ff and 59 ff.

³³ Kropholler *BGB* vor § 398 marg note 2; Zweigert and Kötz (n 25) 446. This is so unless the parties agree otherwise: Kropholler *loc cit*.

³⁴ *Johnson v Incorporated General Insurances Ltd supra* at 331H (ambiguous); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). See Van der Merwe *et al Contract* at 326n32, where the authors dismiss apparent support of the causal system in these cases as not being authoritative and remark that Scott's comments this regard are misleading: 'Scott does not require a valid *causa* for the efficacy of the cession, but seems thereby to be making the point that an invalid *causa* may permit a cedent to undo the effect of a cession by means of an enrichment claim'. If there is an enrichment claim, then there is, by definition, no *causa*.

of authority also favours the abstract approach.³⁵ The transfer agreement is, therefore, like the real agreement³⁶ in the case of *traditio*, an abstract legal act.³⁷ Its validity is thus, in general,³⁸ independent of any underlying agreement³⁹ in terms of which the cession takes place,⁴⁰ unless the parties agree otherwise.⁴¹

It took centuries for the *ius commune* to recognise the institution of cession.⁴² When it eventually took this step, however, it did so boldly and decisively. Cession is not, as one might have expected, hedged around with unduly restrictive provisions; on the contrary, it is now remarkably easy for parties to cede rights in both German and South African law. All that is required, apart from the agreement of transfer, is that the cedent holds a right capable of being ceded,⁴³ and the satisfaction of the other requirements which apply to all agreements,⁴⁴ such as capacity to act,⁴⁵ legality,⁴⁶ certainty⁴⁷ and so on. In both legal systems, a purely informal cession is

³⁵ Lubbe and Murray *Contract* 649; Scott *Cession* 49-51; Van der Merwe *et al Contract* 326, 327; Zimmermann *Law of Obligations* 65n229; Joubert (n 4) 192-3. Also see, e.g., *Headleigh Private Hospital (Pty) Ltd v Rand Clinic v Soller & Manning Attorneys and Others supra* at 3711-J (obiter); *Rabinowitz and Another v De Beers Consolidated Mines Ltd and Another supra*. For authority to the contrary, see Joubert (n 4) 193n62.

³⁶ Some writers, e.g. Nienaber (n 4) para 249 and J C De Wet and A H Van Wyk *De Wet and Yeats: Kontrakereg en Handelsreg* 4 ed (1978) 225, also refer to this transfer agreement as a 'real agreement' but cf Scott *Cession* 9 ff.

³⁷ In German, an 'abstrakter Verfügungsgeschäft'. On the arguments for the application of the principle of abstraction to cession, see, for example, Scott *Cession* 79 ff, particularly 84 ff.

³⁸ Cf German law, in which there are various exceptions to the application of the abstract system viz if the underlying agreement was concluded on the basis of fraud or mistake, or is *contra bonos mores*: see Scott *Cession* 82n76.

³⁹ Or other *causa*, such as a provision in a will: see Nienaber (n 4) para 249.

⁴⁰ Nienaber (n 4) para 249; Joubert (n 4) 192-3; *Rabinowitz and Another v De Beers Consolidated Mines Ltd and Another supra*; *Headleigh Private Hospital (Pty) Ltd v Rand Clinic v Soller & Manning Attorneys and Others supra* at 3711 (obiter). For authority to the contrary, see Joubert (n 4) 193n62. Kropholler *BGB* vor § 398 marg note 2; Zweigert and Kötz (n 25) 446.

⁴¹ See Van der Merwe *et al Contract* 327n37. For the same idea in German law see Kropholler *BGB* vor § 398 marg note 2; Zweigert and Kötz (n 25) 446.

⁴² See Zimmermann *Law of Obligations* 58 ff.

⁴³ More precisely, the cedent must hold a right, and that right must be capable of being ceded. See, for example, Van der Merwe *et al Contract* 429, 437; Nienaber (n 4) para 249 ('a right capable of being transferred'); *Muller's case supra* at 25H. This must be the consequence of the general rule *nemo plus iuris ad alium transferre potest, quam ipse haberet*. In South Africa, a conditional right, a right subject to a *dies*, and perhaps even a *spes* may be ceded: Hutchison (ed) *Wille's Principles* 493 and 495; Joubert (n 4) 197; Scott *Cession* 49 ff and 170 ff; Nienaber (n 4) paras 230 and 242; *Muller NO v Trust Bank of Africa Ltd and Another supra* at 126E; but cf De Wet and Van Wyk *Kontrakereg* 254.

⁴⁴ Scott *Cession* 70 ff.

⁴⁵ Van der Merwe *et al Contract* 427-8.

⁴⁶ Both the cession and the underlying obligatory agreement must be legal: see Lubbe and Murray *Contract* 649; Scott *Cession* 45, 49-51; Van der Merwe *et al Contract* 427, 447 ff and the cases cited there. According to Van der Merwe *et al Contract*, although the legality of the two agreements should be assessed separately (at 448-9), '[i]n some of the decisions involving champerty the abstract nature of cession is disregarded'. (at 449n210).

valid;⁴⁸ there is no need for documentary evidence, for example, unless the parties have themselves made this a prerequisite for the validity of their cession.⁴⁹ As a general rule,⁵⁰ there is also no need to obtain the consent of the debtor,⁵¹ or even to inform him of the cession.⁵² He might, therefore, only become aware that there has been a substitution of creditors when the cessionary claims performance.

To counterbalance the rules facilitating cession, both legal systems have provisions that safeguard the debtor.⁵³ The most fundamental protection is provided by the general rule that the debtor should not be disadvantaged by the cession.⁵⁴

⁴⁷ The content of the cession must be certain or at least ascertainable: see Van der Merwe *et al Contract* 429; Lubbe and Murray *Contract* 649.

⁴⁸ Hutchison (ed) *Wille's Principles* 492; Joubert (n 4) 193; See Nienaber (n 4) paras 246 and 247; *Wright & Co v The Colonial Government* (1891) 8 SC 260; Kropholler *BGB* vor § 398 marg note 4. Regarding the delivery of documents, if any, see Scott *Cession* 27 ff. It should also be noted that South African law requires compliance with formal requirements for validity of a cession in some exceptional circumstances (e.g. registration of a mortgagee's real right), and the parties themselves may stipulate that formalities be required: see Hutchison (ed) *Wille's Principles* 492, 493.

⁴⁹ There are also certain other exceptional circumstances in which formalities are required for the validity of a cession – see the previous footnote.

⁵⁰ His consent may be required in certain exceptional cases e.g. where the obligation to be ceded is of a personal nature (see, e.g., *Hammond, Harvey & Newton v Union Textile Mills Ltd* 1949 (3) SA 398 (E)). See also Hutchison (ed) *Wille's Principles* 493; Wessels *Contract* para 1711, § 399 BGB. Regarding the impermissibility of cession in this case, see Kropholler *BGB* vor § 398 marg notes 5 and 6, and in the case where the parties have concluded a *pactum de non cedendo*, see Hutchison (ed) *Wille's Principles* 494).

⁵¹ Implied by § 398 BGB; Zweigert and Kötz (n 25) 445; Hutchison (ed) *Wille's Principles* 491; Nienaber (n 4) paras 227 and 251; Scott *Cession* 7; Van der Merwe *et al Contract* 420; *Van Zyl v Credit Corporation of SA Ltd supra* at 588F-H; *Milner v Union Dominions Corporation (SA) Ltd and Another supra* at 676F. Cf also *Johnson v Incorporated General Insurances Ltd supra* at 330H *in fin*.

⁵² Hutchison (ed) *Wille's Principles* 492; § 407 BGB; Zimmermann *Law of Obligations* 66; Zweigert and Kötz (n 25) 446; Nienaber (n 4) paras 227 and 251; Van der Merwe *et al Contract* 452; but cf Scott *Cession* 95 ff. It is advisable, however, for the new creditor to give the debtor notice of the cession because if the debtor pays the cedent without being aware of the cession, his debt will be discharged. If, on the other hand, the debtor pays the cedent while aware of the cession, he will remain liable to the cessionary: see, e.g., *Headleigh Private Hospital (Pty) Ltd v Rand Clinic v Soller & Manning Attorneys and Others supra* at 372G-H and see below at p 343. Also see Van der Merwe *et al Contract* 453: good faith is more important than mere notice. Notice will obviously be a prerequisite for a valid cession, however, in those circumstances in which the parties have agreed that his consent is required. So much for notice to the debtor. Turning to the position of the creditor, on the other hand, in terms of German law, the former creditor is obliged to give the new creditor necessary information in order for the validity of the claim and to deliver to him the written document for the proving of the claim in so far as it is in his possession: § 402 BGB. Cf South African law, where the situation is uncertain: see, e.g., Hutchison (ed) *Wille's Principles* 492. The cedent also has to issue an officially countersigned document regarding the cession to the new creditor on demand, the costs of which are to be borne by the new creditor.

⁵³ §§ 404 ff BGB; Zimmermann *Law of Obligations* 66.

⁵⁴ For example, by being exposed to a 'multiplicity of actions or increased costs': Van der Merwe *et al Contract* 449 ff. Also see Hutchison (ed) *Wille's Principles* 495; *Duke v Allen* 1953 (3) SA 702 (N) at 703E; De Wet and Van Wyk *Kontraktereg* 231-2, 259; Nienaber (n

Thus, for example, the cessionary may not acquire a greater right than the cedent had: *nemo plus iuris ad alium transferre potest, quam ipse habet*.⁵⁵ Flowing from the rule against the debtor being prejudiced by the cession are various other protective requirements.⁵⁶ Should, for example, the debtor pay the cedent without being aware of the cession, his debt will be discharged.⁵⁷ (If, on the other hand, the debtor pays the cedent having received notice of the cession, he will still be obliged to perform to the cessionary.)⁵⁸ The ceded right carries along with it all its advantages and disadvantages.⁵⁹ The debtor may therefore raise against the cessionary any defences which he could have raised against the cedent.^{60 61}

4) para 258; Scott *Cession* 192 ff. For statements of this rule in German law, see, for example, *Münchener Kommentar/Lieb* § 812 marg note 124b; Loewenheim *Bereicherungsrecht* 55.

⁵⁵ As in property law, therefore, the transferor (here the cedent) may not transfer a greater right than he himself holds. See, for example, Nienaber (n 4) para 263; Scott *Cession* 221; Van der Merwe *et al Contract* 427n58.

⁵⁶ For example, that 'the cession of part of a debt or a cession purporting to split the debt among a number of cessionaries, without the consent of the debtor, is invalid': *Kotsoupolous v Bilardi supra* at 396E-F.

⁵⁷ *Illings (Acceptance) Co (Pty) Ltd v Ensor NO* 1982 (1) SA 570 (A) at 578F; Hutchison (ed) *Wille's Principles* 492-3; Joubert (n 4) 194; Christie *Contract* 542; Zweigert and Kötz (n 25) 445. As in Roman-Dutch law: Van der Merwe *et al Contract* 453 ('the debtor who paid the cedent in ignorance of the cession was immune from liability towards the cessionary'). This is implied by § 407 (1) BGB: '[Leistung an den bisherigen Gläubiger] Der neue Gläubiger muß eine Leistung, die der Schuldner nach der Abtretung an den bisherigen Gläubiger bewirkt, sowie jedes Rechtsgeschäft, das nach der Abtretung zwischen dem Schuldner und dem bisherigen Gläubiger in Ansehung der Forderung vorgenommen wird, gegen sich gelten lassen, es sei denn, daß der Schuldner die Abtretung bei der Leistung oder der Vornahme des Rechtsgeschäfts kennt.' ('The assignee must give credit for an act of performance done by the debtor in favor of the assignor after the assignment, or any legal transaction entered into between the debtor and the assignor in respect of the principal debt after the assignment, unless the debtor knew of the assignment at the time of performance or of entering into the legal transaction'.) (transl I S Forrester, S L Goren and H-M Ilgen *The German Civil Code* (1975)).

⁵⁸ Hutchison (ed) *Wille's Principles* 493; *Sasfin (Pty) Ltd v Beukes supra* at 637I; Van der Merwe *et al Contract* 453; *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others supra* at 372G-H. This is also implied by § 407 (1) BGB.

⁵⁹ See, for example, Nienaber (n 4) paras 268 and 269; Scott *Cession* 223 ff.

⁶⁰ Hutchison (ed) *Wille's Principles* 495; Joubert (n 4) 197; Nienaber (n 4) paras 258, 269; *Van Zyl v Credit Corporation of SA Ltd supra* at 588F-H. In South African law at least, the debtor may only raise defences *in rem* and not *in personam*: e.g. defences which do not have to do with the cedent's personal capacities (e.g. prescription, set-off etc): Hutchison (ed) *Wille's Principles* 495. A counter-claim may usually not be brought against the cessionary in South African law: *loc cit*. This is because 'cession transfers rights but not duties': *loc cit*. Cf the position in German law: § 406 BGB: '[Aufrechnung gegenüber dem neuen Gläubiger] Der Schuldner kann eine ihm gegen den bisherigen Gläubiger zustehende Forderung auch dem neuen Gläubiger gegenüber aufrechnen, es sei denn, daß er bei dem Erwerbe der Forderung von der Abtretung Kenntnis hatte oder daß die Forderung erst nach der Erlangung der Kenntnis und später als die abgetretene Forderung fällig geworden ist.' ([Set-off against the assignee] The debtor may also set off against the assignee an existing claim which the debtor has against the assignor, unless he had knowledge of the assignment at the time of the acquisition of the claim, or unless the claim did not become due until after he had acquired such knowledge and after the maturity of the principal debt.) (Transl Forrester *et al* (n 57)). Also see Zweigert and Kötz (n 25) 448.

The position in both German and South African law, assuming that all the transactions were validly effected, may be summed up with this example: A owes a performance to B. B then concludes a valid contract with C in terms of which, in exchange for payment by C, B undertakes to cede his claim against A to C. The cession validly takes place, C replaces B as A's creditor and B disappears from the legal picture. C can claim performance from A,⁶² and A's performance to C will discharge his debt. Had A performed to B instead, his debt would only be discharged if he (A) had no knowledge of the cession. If he knew about the cession, on the other hand, he would still be liable to C.

ENRICHMENT LIABILITY

Enrichment could occur within this context in either of two ways. Someone may either be enriched by the mere receipt of a right,⁶³ being an asset, or by receiving performance in terms of a right which has in fact not been validly transferred to the recipient of the performance.

Assuming that B cedes or purports to cede a claim against A to C, and the debtor A consequently performs as required in terms of the claim to C, the first possibility which could arise is that it transpires that the claim that was purportedly ceded (B-A) was void. The question then would be whether A would have a claim based on unjustified enrichment against B or against C? For example, A is B's insurer. B cedes a claim against his insurer, based on damage to his factory, to C. A therefore pays this amount to C but it is subsequently discovered that B had no valid claim against A because he (B) had deliberately had the factory set on fire.⁶⁴ Can A

⁶¹ § 404 BGB: '[Einwendungen des Schuldners] Der Schuldner kann dem neuen Gläubiger die Einwendungen entgegensetzen, die zur Zeit der Abtretung der Forderung gegen den bisherigen Gläubiger begründet waren.' (The debtor can raise against the new creditor those defences that were justified against the former creditor at the time of the cession); Kropholler *BGB* vor § 398 marg note 11; Zweigert and Kötz (n 25) 447-8.

⁶² And the claim could be met by a defence that A could previously have raised against B.

⁶³ For someone to receive a right *sine causa*, there must have been a valid cession in the absence of a valid underlying obligatory agreement. As was seen above, this is made theoretically possible by the operation of the principle of abstraction. In practice, however, it is much more likely that a performance in terms of the right (rather than the mere loss of a right) would prompt an enrichment claim.

⁶⁴ Cf the facts of BGHZ 105, 365 and the discussion below at p 347 ff.

reclaim the payment directly from C or must he rather sue B?

A second possibility is that, although B has a valid claim against A, and C against B (arising from their obligatory agreement), and A has handed the thing or the money⁶⁵ to C, the purported cession between B and C was invalid or non-existent. For example, B purports to cede a valid claim against his insurer, A, to his creditor C, but the cession does not take place because of a *reservatio mentalis* on the part of C. Or C fraudulently tells A that he has taken B's place as A's creditor as a result of a cession by B (which in fact had not taken place at all). Again, we must ask whether A, having mistakenly performed to C, will have an enrichment claim against B or C.

It could also happen that merely the obligatory agreement underlying the cession is invalid or absent. Due to the application of the principle of abstraction in both systems, this invalidity will not have any influence on the validity of the cession: provided that the 'real agreement' exists between B and C (i.e. B intends to cede and C to receive the claim), the cession itself will be valid. This may be illustrated by the following example: B has a valid claim against his insurer A. B purports to enter into an obligatory agreement with C (a creditor in terms of a previous transaction) in terms of which B will cede his claim against A to C, but this is void for some reason.⁶⁶ The cession takes place validly, however, due to the coincidence of B's *animus cedendi* and C's *animus recipiendi*. The question is then whether A will be entitled to an enrichment claim against either of the other parties.

Then there is the hypothetical case that the underlying transactions between both A and B, on the one hand, and B and C, on the other, are invalid: a case of what the Germans would call *Doppelmangel* (double-fault). So, for example, A performs to C, despite the fact that B has no valid claim against his insurer A, the purported cession of this claim is also invalid, and there is no valid obligatory agreement between B and C. Whom can A sue in terms of the law of unjustified enrichment?

Next, the situation could arise in which the contract between A and B, the

⁶⁵ Or made any other performance e.g. a *factum*.

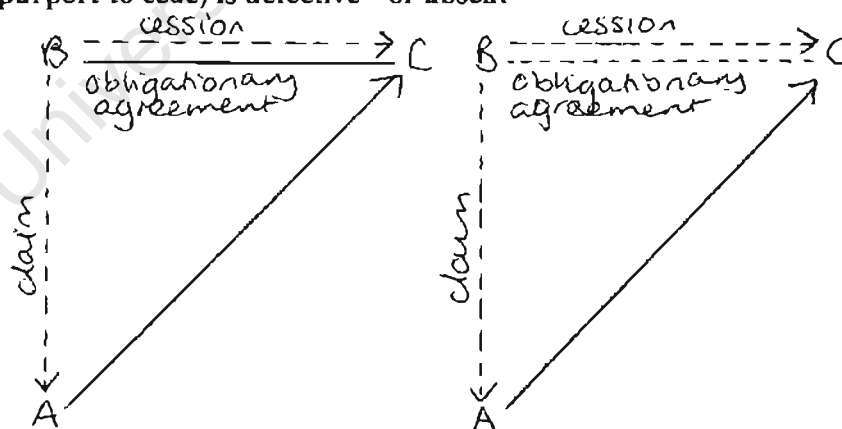
⁶⁶ E.g. *iustus error* (in South African law but not in German law, as pointed out in Chapter One at p 20), or uncertainty as to the counter-performance.

claim arising therefrom, the obligatory agreement and the cession between B and C are all valid, but A simply pays C too much. So, for example, B cedes a valid claim against his insurer A in the amount of R3 000 for damage to his house to the person who did the repairs (C) and A mistakenly pays C R8 000. Would an enrichment claim lie against B or C?

Lastly, B might have a valid claim against A, which he validly cedes to X. He then fraudulently purports to cede the same claim to C. If A performs to C, what enrichment and other claims will be available? For instance, a businessman B is being hounded by creditors and his business is teetering on the brink of liquidation. He has a claim against his insurer A and cedes it to a creditor, X, in repayment of a loan. This placates X but another creditor, C, is still insistently demanding payment, so B purports to settle his debt to C by ceding the same claim against the insurer A to C.

Each of these potential situations of enrichment liability will now be dealt considered: where B has no valid claim against A; where B has not validly ceded his claim against A to C; where neither claim exists; where both claims exist but A has performed too much to C, and where there is a 'double cession'.⁶⁷

- 1) The relationship between A and B (i.e. the claim which the parties purport to cede)⁶⁸ is defective or absent



⁶⁷ Or a multiple cession because, of course, there could be more than two purported cessions of the same claim.

⁶⁸ Note that this includes voidability but that, as mentioned in Chapter One above at p 20, once a voidable contract has been avoided in terms of German law, any remedies which arise will be enrichment rather than contractual remedies. The practical result, therefore, is the same regardless whether the underlying agreement is void or voidable, unlike South African law,

In the illustrated situation, the purported cession has no object: B purports to cede something to C that does not exist. Thus, for example, A and B might have concluded a contract in terms of which B would have a claim upon the fulfilment of a suspensive condition. It could happen that B, thinking that the condition has been fulfilled, cedes his 'claim' to C, and A, also labouring under this misapprehension, performs to C. What would happen if, in fact, the condition had not been fulfilled? Alternatively, A and B might have purported to conclude a contract that was void for illegality,⁶⁹ or vagueness, or lack of compliance with formalities,⁷⁰ or (in South African but not in German law)⁷¹ their contract might be void by reason of a material mistake.⁷² In these cases, there would be no valid underlying contract between A and B, and therefore no valid claim to be ceded. The question, again, is what would happen if B had purported to cede this non-existent claim to C, and A had consequently performed to C?⁷³

German law

Regarding German law, the first point to note is that if the claim which B purports to cede to C does not exist, the envisaged cession between B and C 'geht ins Leere' (i.e. literally, 'goes into the void').⁷⁴ Just as there can be no valid transfer of corporeal property that does not exist, there can be no valid cession of a claim that does not exist. In other words, if there is no claim B–A, then there can be no valid cession B–C.

If the underlying obligatory agreement between B and C is also invalid,

as will be shown below.

⁶⁹ Note that, in German law, cases where the underlying agreement was *contra bonos mores* would be treated differently: see the discussion at p 386 below.

⁷⁰ See, for example, *Hennie Slabbert Motors (Pty) Ltd v De Lange* 1966 (3) SA 45 (T) and *Koen v Goosen* 1971 (3) SA 501 (C) and the discussion of these cases at p 368 ff below.

⁷¹ Because, in German law, error leads to contracts being voidable, and not void: § 119 BGB.

⁷² Regarding the contract between A and B, the other ground for voidness in South African law, viz impossibility, could only arise in such circumstances where only B's performance were initially objectively impossible; if A's performance were impossible, then A obviously could not have performed to C. Regarding the effect of impossibility on the contract between B and C, see p 348 ff below.

⁷³ It is extremely unlikely that A would perform to C in terms of a purported cession by B to C in the total absence of any contact at all between A and B.

⁷⁴ It is not clear to me whether there is any difference between 'going into the void' and *Nichtigkeit*. It is not that one concerns a 'real' agreement or *Erfüllungsgeschäft* and the other an ordinary obligatory contract, because a real agreement can itself be void. The consequences are, in any event, the same.

we will be confronted with a case of *Doppelmangel*. If, on the other hand, the underlying obligatory agreement between B and C is valid and enforceable, this will amount to a case of breach (of the underlying agreement to cede), entitling C to remedies for breach of contract.

Imagine, for example, that B insures his motor car with insurer A. B's car is subsequently stolen and B concludes a contract of sale with C, in terms of which B undertakes to cede his claim against A to C. Unbeknownst to B and C, B has no valid claim against A as he did not disclose certain information when applying for the policy. B then purports to cede this (non-existent) claim to C.

In order to determine what sort of recourse C might have against B, we should ask whether their contract of sale was valid or not. At first glance, a South African lawyer might think that a contract to cede a non-existent right would be void for impossibility. The general position in German law, prior to the reform of the law of obligations, was like South African law in that a contract would indeed be void if an envisaged performance in terms thereof was initially objectively impossible.⁷⁵ There was, however, an exception to the rules of impossibility in that a contract for the sale of a non-existent right would be valid despite the fact that it was initially objectively impossible to make performance.⁷⁶ In other words, in the example mentioned in the previous paragraph, the contract between B and C would be valid, and C could sue B for breach of contract.

The current position in German law – since the statutory changes to the law

⁷⁵ See the old § 306 BGB.

⁷⁶ See Hans Brox *Allgemeines Schuldrecht* 27ed (2000) marg note 239: 'Obwohl der Kaufvertrag über eine nicht bestehende Forderung oder ein nicht existierendes Recht auf eine ursprünglich objektiv unmögliche Leistung gerichtet ist, ergibt sich aus §§ 437, 440 I, dass in Abweichung von § 306 der Vertrag gültig ist; der Verkäufer haftet für den rechtlichen Bestand auf das Erfüllungsinteresse....' See § 437 BGB: '[Gewährleistung bei Rechtskauf] (1) Der Verkäufer einer Forderung oder eines sonstigen Rechtes haftet für den rechtlichen Bestand der Forderung oder des Rechtes.' ('[Warranty in case of purchase of a right] (1) The seller of a claim or any other right warrants the legal existence of the claim or of the right.') § 440 (1) reads as follows: 'Erfüllt der Verkäufer die ihm nach den §§ 433 bis 437, 439 obliegenden Verpflichtungen nicht, so bestimmen sich die Rechte des Käufers nach den Vorschriften der §§ 320 bis 327.' ('If the seller does not fulfill the obligations imposed upon him by §§ 433 to 437, 439, the rights of the purchaser are determined according to the provisions of §§ 320 to 327.') §§ 320 to 327 BGB contain general rules on reciprocal contracts. Another example in which the underlying obligatory agreement would be valid: at the time of conclusion of the agreement, B had a valid claim against A but it had prescribed before the purported cession took place: see Medicus *Schuldrecht II* marg note

of obligations – is that any agreement⁷⁷ will be valid even if the performance in question is initially objectively impossible.⁷⁸ If, for example, B and C had concluded a contract of donation rather than a sale, that contract of donation would now also be valid notwithstanding the impossibility of its performance.⁷⁹ According to the new rules, however, contracts that are impossible of performance are unenforceable.⁸⁰ In other words, if B agreed to cede his (non-existent) claim against A to C, the agreement between B and C would be valid, but C would not be able to claim specific performance of that agreement.⁸¹ If he had made a counterperformance for the intended cession, however, C would be afforded a claim in terms of the new § 326 BGB.⁸²

In other words, B *can* conclude a valid obligatory agreement to cede a non-existent claim to C. Any purported cession in terms thereof would, however, still come to naught. So, in terms of German law, there can be a situation where there is no valid relationship between A and B, on the one hand, but a valid (albeit unenforceable) obligatory agreement, though no cession, between B and C.

In any case, A will be out of pocket if he has performed to C. According to German law, if A performs to C, he will generally be entitled to an enrichment

150; § 438 (1) BGB.

⁷⁷ In other words, not just sales of rights.

⁷⁸ §§ 275 (1) (see note 81 below) and 311a BGB. § 311a BGB reads as follows: '[Leistungshindernis bei Vertragsschluss] (1) Der Wirksamkeit eines Vertrags steht es nicht entgegen, dass der Schuldner nach § 275 Abs. 1 bis 3 nicht zu leisten braucht und das Leistungshindernis schon bei Vertragsschluss vorliegt. ([Impediment to performance at the time of the conclusion of the contract] (1) The fact[s] that by virtue of § 275 (1) to (3) the obligor does not need to perform and [that] the impediment to performance already exists upon conclusion of the contract does not prevent the contract from being valid.') (Transl G Dannemann *German Law Archive* www.iuscomp.org/ela/statutes/BGB.htm 5/11/04. A possible problem encountered here is that the leading cases involving a purported cession of a non-existent right were decided prior to the changes in the law regarding impossibility. The problem seems more apparent than real, however, because the writers who commented on such cases generally did not emphasise the presence or absence of any underlying agreement between B and C.

⁷⁹ Of course, the underlying agreement to cede could be invalid for some reason other than impossibility, in which case the case would be classified as one of *Doppelmangel*.

⁸⁰ It appears that this rule applies to cases of sale of a right that does not exist: see Medicus *Schuldrecht II* marg note 150 on p 74. It should be pointed out, however, that the new rules have introduced some lack of clarity regarding contracts of sale of rights generally: see Medicus *op cit* marg note 149 ff.

⁸¹ § 275 BGB '[Ausschluss der Leistungspflicht] (1) Der Anspruch auf Leistung ist ausgeschlossen, soweit diese für den Schuldner oder für jedermann unmöglich ist.' ([Exclusion of the obligation to perform] (1) A claim for performance cannot be made in so far as it is impossible for the obligor or for anyone else to perform.') (Transl Dannemann (n 78). In other words, he cannot claim cession, in the set of facts presently being considered.

action.⁸³ The crucial question, which has led to much controversy in Germany,⁸⁴ is whether this action should be brought against B or directly against C.

If one employs the *Leistungsbegriff*, one arrives at the answer that A's claim should lie against C.⁸⁵ A has, after all, not only factually but also legally performed directly to C,⁸⁶ in the sense that he did so with the conscious purpose of performing to C.⁸⁷ A, in making the performance, intends to perform to C and not to his (supposed) original creditor, B, and C would interpret A's performance as a performance to himself and not to B.⁸⁸ The fact that B is in no way involved in this performance has led the devotees of the *Leistungsbegriff* to argue that this is not a case of three-party enrichment at all; once the cession has taken place, so their argument goes, B falls out of the equation and there remains a simple two-party relationship, which can easily be disposed of by means of the *Leistungsbegriff*.⁸⁹

With respect, this seems to overlook the rather obvious point that the cession

⁸² Whereas under the old law he would have had an enrichment claim.

⁸³ Unless he performed in the knowledge that there was no claim against him (§ 814 BGB), or if he acted illegally or immorally in making the performance (in accordance with the German equivalent of the *par delictum* rule, § 817 BGB) in circumstances where the underlying contract was illegal or immoral.

⁸⁴ According to Medicus, this is the most controversial of the three-cornered enrichment relationships other than the *Anweisung*-cases: Medicus *Schuldrecht II* marg note 730. Also see Larenz and Canaris *Schuldrecht II/2* 237; Loewenheim *Bereicherungsrecht* 54.

⁸⁵ See, for example, W. Lorenz 'Abtretung einer Forderung aus mangelhaftem Kausalverhältnis: Von wem kondiziert der Schuldner?' (1991) 191 *AcP* 279 at 295 and 297.

⁸⁶ Compare this with the discussion of the *Anweisung*-cases in Chapter Three above, where it was pointed out (e.g. at p. 165 ff) that, even though A may physically hand something over to C, if he does so in accordance with an *Anweisung* from B this will be regarded by the law as a performance via B to C. Larenz and Canaris *Schuldrecht II/2* 238 state that one cannot argue that the debtor A in any way 'performs' to the cedent B without a 'sacrificium intellectus'. They use this as a further argument to support their view that the *Leistungsbegriff* is not able to bear the load placed upon it. This now seems to be the majority opinion, but cf BGHZ 105, 365 (at 369-70) and BGHZ 122, 46 (at 48).

⁸⁷ But cf BGHZ 105, 365 (369-70), where the court held that A's *Leistung* was to B. In this regard, see Lorenz (1991) 191 *AcP* 279 at 295, where he cites this judgment as evidence of the weakness of the *Leistungsbegriff*: whereas 'it would be difficult to deny that the debtor who pays in terms of a claim which has been transferred to the cessionary thereby consciously and directly increases the assets of the cessionary' ('es läßt sich wohl schwerlich leugnen, daß der Schuldner, der eine auf den Zessionar übergangene Forderung bezahlt, damit bewußt und unmittelbar dessen Vermögen mehrt'), the court succeeds in using this very concept to justify a claim against the cedent by considering the situation objectively from the point of view of the cessionary. In BGHZ 122, 46, the court *a quo* said that the payment of A should be regarded as if A performed to B and B to C (see p. 47 of the BGH's judgment). See also p. 357 ff below.

⁸⁸ On the *Leistungsbegriff* and the *Empfängerhorizont* see Chapter One at pp. 38 ff and 40-1 above.

⁸⁹ Medicus *Bürgerliches Recht* marg note 685a; *Münchener Kommentar/Lieb* § 812 marg note 122; Loewenheim *Bereicherungsrecht* 54; Reuter and Martinek *Bereicherung* 489 ff.

has in fact *not* taken place (as there was no claim to cede), so there has been no mere substitution of creditors and B has *not* disappeared from the picture. The argument that only two parties are involved has also been criticised on the grounds that the debtor's *Zuwendung* to C is intended to constitute performance of, firstly, the non-existent claim (B–A) which B purportedly ceded to C and, secondly, the cessionary's claim against the cedent (C–B) in terms of the underlying obligatory agreement.⁹⁰ The 'performance' of this (non-existent) claim is therefore intended to simultaneously extinguish C's (supposed) claims against A *and* B, which 'justifies the inclusion of the cedent in the unravelling'.⁹¹ In other words, because the debtor's handing-over is intended to fulfil not only the cessionary's apparent claim against him, but also the cessionary's actual or supposed claim against the cedent, one cannot argue that only two parties are involved.

Eschewing the *Leistungsbegriff* in such cases, therefore, and bowing to the demands of legal consistency and the need to balance the interests of the parties (particularly with regard to the allocation of risk),⁹² both the *herrschende Meinung* and the courts⁹³ prefer the view that A should have a claim against B rather than directly against C.⁹⁴

The first argument in support of the solution favoured by the *herrschende Meinung* is that of consistency. Requiring A to proceed 'via the triangle' (i.e. to sue B instead of C) would accord with the solution proposed for the cases where there was an *Anweisung* but no valid underlying agreement between A and B.⁹⁵ This is not just a matter of legal elegance, but one of practical necessity; in practice it can often

⁹⁰ *Münchener Kommentar/Lieb* § 812 marg note 122. This forms the background to his argument that A should rather have a claim against B, which will be dealt with below.

⁹¹ *Münchener Kommentar/Lieb* § 812 marg note 122: The debtor has the intention to settle his debt in terms of the ceded claim; the cedent, in ceding the claim, intends to settle his debt in terms of the obligatory agreement.

⁹² See, for example, Lorenz (1991) 191 *AcP* 279 at 295-6. Another important factor is *Zurechenbarkeit* ('attributability'): see Lorenz *op cit* at 296.

⁹³ Loewenheim *Bereicherungsrecht* 54-5; Werner Flume 'Der Bereicherungsausgleich in Mehrpersonenverhältnissen' (1999) 199 *AcP* 1 at 19; BGHZ 105, 365; BGHZ 122, 46 (51).

⁹⁴ See, e.g., Loewenheim *Bereicherungsrecht* 54-5; *Münchener Kommentar/Lieb* § 812 marg note 121. Cf Lorenz (1999) 199 *AcP* 1 at 19.

⁹⁵ See, for example, Lorenz and Canaris *Schuldrecht II*/2 237 (where it is clear that they are referring to this category of *Anweisung* case as being similar to the cession of a non-existent right because they say '... es sich um einen (bloßen) Mangel im Deckungsverhältnis handeln würde.'). This line of argument has also been used by the courts: see Flume (1999) 199 *AcP* 1 at 20; BGHZ 105, 365 and BGHZ 122, 46. For a contrary point of view, see Flume (1999) 199 *AcP* 1 at 21, and the discussion of his views at p 353 below.

be extremely difficult to determine whether A's performance to C was made in response to a cession or a *Anweisung*.⁹⁶ This difficulty is apparent, for example, if one compares a bank's payment in terms of a cheque or other bill of exchange to a payment in response to a cession which has been symbolised by the handing over of documentary evidence thereof (an *Urkunde*). In both cases, A performs to C upon C's presentation of a document which he has received from B, which requires A to perform (in terms of B's supposed claim against him) to C.

An analysis of the relative interests of the parties also leads the majority of writers to conclude that A should proceed against B.⁹⁷ First of all, if A had to bring his claim against C, he would bear the risk of C's raising the defence of loss of enrichment,⁹⁸ or of his disappearance or insolvency.⁹⁹ While the law would have no objection to A's bearing the risk that B might have disposed of the enrichment or disappeared or been a man of straw, because A had the chance to sum up his character at the time of contracting,¹⁰⁰ C is an unknown quantity. The imposition of this risk would therefore fly in the face of the principle that the debtor's legal position should not be made worse by the cession,¹⁰¹ which occurred without his participation.¹⁰² It would also be contrary to Canaris's third principle viz that the risk of a party's insolvency should only be imposed upon his original contracting partner, who was after all the one who sought him out.¹⁰³ In other words, an enrichment

⁹⁶ Larenz and Canaris *Schuldrecht* II/2 237.

⁹⁷ See, e.g., Larenz and Canaris *Schuldrecht* II/2 237. But see, *contra*, Flume (1999) 199 *AcP* 1 at 24 and the discussion of his views below.

⁹⁸ In terms of § 818 (3) BGB.

⁹⁹ Larenz and Canaris *Schuldrecht* II/2 237; Loewenheim *Bereicherungsrecht* 54.

¹⁰⁰ What this implies is that the creditworthiness and character of the *creditor* are at issue. Elsewhere in the law, it is the creditworthiness of the *debtor* that is important. For enrichment law, what is more important is the ability of the creditor to pay in terms of an enrichment claim. What is relevant, therefore, is not the creditor's ability to pay or perform, but his ability to pay back or return a performance (see Manfred Lieb 'Zur bereicherungsrechtlichen Rückabwicklung bei der Zession' (1990) 7 *Jura* 359 at 361). It thus implies that the debtor seeks out, not somebody undemanding, but somebody who will be willing and able to return what he has received should it turn out to have been received without legal ground. This argument thus presupposes that the debtor, in concluding his contract, is taking into account the possibility that his contracting partner might go insolvent and therefore not be able to pay back what he received unjustifiably. This seems rather far-fetched. In a nutshell, what Canaris is saying is that once you have sought out a contracting partner, you have to stick to him, for better or for worse.

¹⁰¹ *Münchener Kommentar*/Lieb § 812 marg note 124b; Loewenheim *Bereicherungsrecht* 55 (who points out that this rule compensates for the fact that the debtor cannot prevent the transfer to the cessionary of the claim against him (the debtor)); Palandt § 812 marg note 67.

¹⁰² Larenz and Canaris *Schuldrecht* II/2 237.

¹⁰³ Larenz and Canaris *Schuldrecht* II/2 237; *Münchener Kommentar*/Lieb § 812 marg note 124b; Loewenheim *Bereicherungsrecht* 55.

claim should only lie between the parties to the defective causal relationship in question; because the defect originated in the relationship between the debtor A and the cedent B, any enrichment claim should be confined to these two parties.¹⁰⁴

The view that enrichment claims should be directed 'via the triangle' (A–B–C) may be supported by the majority of writers, but the majority is a narrow one.¹⁰⁵ One of the influential voices of dissent is that of Flume.¹⁰⁶ In his opinion, A should be allowed to sue C directly in such circumstances.¹⁰⁷ Regarding the argument that A should sue B because this would be consistent with the preferred solution in *Anweisung* cases, he says that this situation (i.e. where B purports to cede a non-existent claim against A to C) is not comparable to the situation where there is an *Anweisung* in the absence of a valid underlying agreement between A and B.¹⁰⁸ He argues that, if one wants to compare this case to one of the *Anweisung* situations, the appropriate parallel would be the case where there was no valid *Anweisung* (in which case A would have a direct claim against C): in the case of cession of an invalid right, the notice of cession would be invalid, and such cases should therefore be compared with cases where an invalid cheque (or other *Anweisung*) was handed over.¹⁰⁹

He also disputes the majority's analysis of the interests of the parties. First of all, he says that this is a matter for the law of enrichment, and not for the law of cession.¹¹⁰ He thus implies that the majority is incorrect in finding a solution to the enrichment problem by using rules of the law of cession. It certainly seems strange

¹⁰⁴ Larenz and Canaris *Schuldrecht* II/2 237. The authors also justify this result by referring to the relationship between the *Leistungskondition* and the other remedies aimed at 'undoing' the contract between the debtor and the cedent.

¹⁰⁵ See Flume (1999) 199 *AcP* 1 at 19, where he tallies the numbers of supporters and opponents. Larenz and Canaris *Schuldrecht* II/2 also say (at 237) that there is a 'strong minority opinion' supporting a claim A–C.

¹⁰⁶ See, for example, his article in (1999) 199 *AcP* 1 (reprinted in Wolfgang Ernst (ed) *Werner Flume: Studien zur Lehre von der ungerechtfertigten Bereicherung* (2003) at 105 ff).

¹⁰⁷ See Flume (1999) 199 *AcP* 1 at 21.

¹⁰⁸ (1999) 199 *AcP* 1 at 21.

¹⁰⁹ See Flume (1999) 199 *AcP* 1 at 21. He points out that, in the case of an *Anweisung*, the instructing party 'adopts' the performance of the instructed party as his own and, if the *Anweisung* is invalid, the attribution of the performance A–C to B falls away. The notice of cession of a non-existent claim is invalid as it has no object, he says, and if the two cases are to be compared, the declaration of cession of a non-existent claim should be equated to an invalid *Anweisung*.

¹¹⁰ See Flume (1999) 199 *AcP* 1 at 24.

to say, as Larenz and Canaris do,¹¹¹ that the position of the so-called debtor should not be made worse by a cession which took place without the debtor's co-operation, when he was in fact not a debtor and no cession took place. Flume goes on to argue that, in any case, the pseudo-cessionary is generally more solvent than the pseudo-cedent and the position of the pseudo-debtor would thus not be worsened by requiring him to sue C rather than B.¹¹² He concedes, however, that the pseudo-debtor would be unjustifiably advantaged if he obtained a solvent cessionary as an enrichment debtor.¹¹³ It should also be noted that, as Medicus says, the risk that the cessionary might be less attractive than the cedent from the debtor's point of view (in that he is less able to return a performance than the cedent would be) is one of the risks imposed on the debtor by the law of cession in any event.¹¹⁴

Flume also makes the point that, generally-speaking, B's pseudo-cession to C will amount to a *Leistung an Erfüllungs Statt* or a *Leistung erfüllungshalber*¹¹⁵ in terms of the obligatory agreement between B and C. A could thus effect performance of B's debt to C (as a third party in terms of § 267 BGB – the kind of situation dealt with in Chapter Two) and would then be entitled to sue B for enrichment.¹¹⁶

Cases of cession of non-existent rights have come before the courts in Germany. While the *Bundesgerichtshof* previously favoured the *condictio* against the cessionary,¹¹⁷ its present approach is now in accordance with the *herrschende Meinung*.¹¹⁸ The leading case¹¹⁹ concerned an insurance policy taken out by Günter M, who was the owner of firm B. In terms of this policy, his insurance company (A) insured his buildings against fire. After a warehouse and a workshop were burnt down, Günter M submitted claims totalling approximately DM 9 million. Suspecting

¹¹¹ *Schuldrecht II/2* 237.

¹¹² Flume (1999) 199 *AcP* 1 at 24-5. Cf the response of Larenz and Canaris that this would unjustifiably advantage the debtor: *Schuldrecht II/2* at 237-8.

¹¹³ Flume (1999) 199 *AcP* 1 at 25.

¹¹⁴ Medicus *Bürgerliches Recht* marg note 685a.

¹¹⁵ For an explanation of these concepts, see Chapter One at pp 37-8.

¹¹⁶ Apart from cases of insolvency or pledge: Flume (1999) 199 *AcP* 1 at 24.

¹¹⁷ See Flume (1999) 199 *AcP* 1 at 19. Also see Lorenz (1991) 1 *AcP* 279 at 283 ff.

¹¹⁸ As the court remarked in BGHZ 122, 46, the leading case (BGHZ 105, 365) has received widespread approval. See, e.g., Lorenz (1991) 1 *AcP* 279; Palandt § 812 marg note 67; Loewenheim *Bereicherungsrecht* 54-5; Lieb (1990) 7 *Jura* 359; Medicus *Bürgerliches Recht* marg note 685.

¹¹⁹ BGHZ 105, 365. Cf the facts of the South African case *Standard General Insurance Co Ltd v SA Brake CC supra*. See note 179 below.

that he had deliberately caused the fire, the insurance company rejected his claims. Günter M thereupon sued the insurance company for payment of part of the original amount claimed. In the same month, he ceded certain of his insurance claims (in respect of the fire damage) to another firm (C) as security in exchange for an advance of credit. The insurance company, upon being informed of the cession of these claims, denied liability and apprised C of the legal proceedings brought by Günter M. It transpired, however, that Günter M actually won his case against the insurance company, which therefore paid C in respect of the claims it had received, expressly reserving its right to raise any defences in terms of § 404 BGB¹²⁰ in the future, and paid the rest to Günter M. Much later, Günter M's firm went insolvent and, ten years after the fire, it was finally established that he had in fact induced a friend to set the workshop alight. In due course, he received his just deserts in the form of a long jail sentence for arson and insurance fraud, amongst other things.

Against this background,¹²¹ the insurance company sued C, on the basis of unjustified enrichment, for repayment of the sums paid to it. C argued that the insurance company should rather seek recourse against Günter M (for the replacement of his lost enrichment). The insurance company was unsuccessful in the local and regional courts so took the case on appeal to the *Bundesgerichtshof*.

The appeal court first reiterated the general points that enrichment cases involving more than two parties usually have more to do with economics than with formal black-letter law and that such cases cannot be decided mechanically according to some predetermined scheme, but have to be judged according to the particular facts of each case. It went on to confirm the decision of the court *a quo* that the insurance company (A) had to sue Günter M (B) as its contracting partner and that there were no grounds for holding the cessionary (C) liable. The court justified this conclusion by appealing to the *Leistungsbegriff*, the allocation of risk, the protection of reliance, the lack of special circumstances which would justify a claim against the cessionary, and the relative interests of the parties.

¹²⁰ § 404 BGB '[Einwendungen des Schuldners] Der Schuldner kann dem neuen Gläubiger die Einwendungen entgegensetzen, die zur Zeit der Abtretung der Forderung gegen den bisherigen Gläubiger begründet waren.' ([Defences of the debtor] The debtor can raise against the new creditor any defences that lay against the former creditor at the time of the cession of the claim.)

¹²¹ In other words, put succinctly, A had paid C in terms of B's non-existent claim against it, which he had purported to cede to C.

More particularly, regarding the *Leistungsbegriff*, the court held that the insurer intended to perform to Günter M in fulfilment of its obligation arising out of the contract of insurance.¹²² In other words, the insurer's *Zweckbestimmung* or intended purpose, and therefore its *Leistung*, was aimed at the cedent rather than the cessionary in this particular case.¹²³ Regarding the allocation of risk, the court agreed that the insurer must carry the risk of the insolvency of the insured in such circumstances.¹²⁴ In the first place, the court argued, an insurance contract demands a higher standard of good faith than most other contracts and that the insurer created the reliance, on the part of its client,¹²⁵ that the claim was valid and that the circumstances were not such that the insurer would deny the protection of the insurance. This, said the court, justified placing the risk of the insured's insolvency on the insurer, if it turned out that this reliance had not been justified.¹²⁶ The court went on to say that the cession of this supposed claim would not change this allocation of risk as the insurer's position would not thereby be worsened, and it would be able to raise its defences against the cessionary. There was also no justification, added the court, for the improvement of the insurer's legal position by the cession.¹²⁷ The court also held that the fact that the cession had been made in exchange for credit was irrelevant, again because it did not worsen the insurer's legal position¹²⁸ and because there was no reason why the insurer's position should be improved by the cession. Finally, the court held that the insurer should carry the risk of the insolvency of the insured rather than that of the cessionary, as it was the former whom it sought out as a contract partner.¹²⁹

The court also suggested *obiter* that the debtor might, however, have a direct

¹²² See the judgment at 369-70. Also see the judgment at 369 on the importance of the performing party's intention.

¹²³ In other words, on the facts of this case, A's *Leistung* was directed at B, but this might not be the case in other factual circumstances. The court also stated that Günter M 'had not lost his character as the insured through the cession of his (supposed) claims to performance' and supported this argument by reference to special rules of insurance law.

¹²⁴ At 371.

¹²⁵ It should be pointed out, however, that the insured knew that he had set the fire and he should therefore have known that his claim against the insurer was invalid. It could also be asked why the court focused on the reliance of the insurer, rather than the reliance of the third party, C.

¹²⁶ At 371.

¹²⁷ At 371.

¹²⁸ Because he could, for example, raise his defences against the cessionary (§ 404 BGB): see p 371 of the judgment.

¹²⁹ At 370-1.

claim against the cessionary in special circumstances, for example, where the cessionary had demanded payment from the debtor especially strenuously.¹³⁰ This aspect of the case has been criticised by writers such as Medicus, with good reason; to base the allocation of liability on the intensity of the demand for payment is, as he says, incorrect.¹³¹

The thrust of this decision was confirmed in a later case,¹³² which also concerned a fraudulent insurance claim. Here, B leased a BMW car from C.¹³³ In terms of the contract of lease, he was obliged to insure the car and to cede the rights in terms of the policy to the lessor C. The contract also made him liable for any loss or damage to the car, regardless of any fault on his part. He accordingly took out a comprehensive insurance policy with insurance company A and handed C a certificate as proof thereof. Several months later, B informed his insurance company that the car had been stolen and the lessor, as cessionary, thus claimed and received compensation of 38 000 DM from the insurance company. It was later discovered that the theft had been a mere pretence. B's statement to the insurance company thus constituted a fraudulent misrepresentation. The insurance company retrieved the car and sold it but instituted an enrichment claim against the cessionary C, taking into account the proceeds of the sale and costs.

The court *a quo* held that, while A's payment to C clearly had no legal ground, the enrichment claim should have been brought against B rather than C because the payment was intended as fulfilment of A's obligation to B in terms of the insurance policy and it should 'therefore [have] be[en] regarded as if the plaintiff had performed to B on the basis of the contract of insurance, and as if B had performed to C on the basis of the contract of lease'.¹³⁴

The court of appeal held that there was no independent legal relationship

¹³⁰ At 372.

¹³¹ Medicus *Bürgerliches Recht* marg note 685a. He agrees that the pseudo-debtor should have a claim against the cessionary, but argues that the reason for this is that, once an effective cession has taken place, there is really only a two-party relationship (between the debtor and the cessionary). Also see Flume (1999) 199 *AcP* 1 at 20 for criticism of the court's suggestion that the intensity of C's demand for payment might be relevant in determining the direction of A's enrichment claim.

¹³² BGHZ 122, 46. For a discussion of the case, see Flume (1999) 199 *AcP* 1 at 19.

¹³³ See BGHZ 122, 46 at 47 for the facts.

¹³⁴ At 48.

between A and C in terms of the law of insurance, and that the obligations arising out of the contract of insurance related to the original insured, i.e. B. It went on to confirm, expressly, the decision in the fire insurance case¹³⁵ and to hold that, as a general rule,¹³⁶ an insurer's enrichment claim should be directed against the insured if the insurer paid the [sum] to a cessionary in ignorance of circumstances which would free him from his obligation to perform.¹³⁷

With regard to the *Leistungsbegriff*, the court held that what is relevant is the purposes envisaged by the performing party and the recipient of the payment at the time of the performance and that one takes a purely objective approach (i.e. only considering the performance merely from the viewpoint of the recipient of the payment) only if the intentions of both parties do not coincide.¹³⁸ Regarding the facts of this case, the court held that the parties had agreed that the insurer intended to fulfil his contract with the insured.¹³⁹

The court confirmed its view that the claim should be directed against the insured by reference to the need to protect the reliance of the parties and the allocation of risk.¹⁴⁰ The court said that the insurer had paid the relevant amount in reliance upon the insured party's allegation of theft of the car and held that 'this justifies burdening the insurance company with the risk of insolvency of the insured, if it later turns out that the reliance was not justified'.¹⁴¹ It went on to hold that the insurance company's position was not worsened by the cession of rights arising from the insurance contract and the issue of a certificate of insurance, because the cessionary would not thereby receive any more extensive rights than those which were already available to the insured. On the other hand, the court stated that the insurance company's position would be unwarrantedly improved if it was able to sue

¹³⁵ See 50, where the court also lists writers who had approved of the decision.

¹³⁶ '[R]egelmäßig': at p 50 of the judgment. In other words, the court seems to go further than in the previous case, in that it does not merely confine this to the facts of this particular case but makes it into a general rule applicable in cases involving cession where payments are made in terms of insurance policies. But cf. the court's comments at 52-3, where it repeats the mantra that in enrichment cases involving more than two parties, any 'schematic solution' is forbidden, and the peculiarities of each case are to be taken into account.

¹³⁷ In doing so, it distinguished this type of case from one of a 'pure' cession and said that this type of case could not be decided according to the rules developed by the BGH in regard to a 'pure cession': see the judgment at 50.

¹³⁸ See the judgment at 50, where the court refers to BGHZ 105, 365 at 369.

¹³⁹ At 51.

¹⁴⁰ At 51.

¹⁴¹ At 51.

the cessionary rather than the insured in such cases because the cessionary would typically be more creditworthy than the insured. The court therefore preferred the view that an enrichment claim should be directed against B rather than C because it does not disturb the allocation of the risks typical in insurance cases¹⁴² and it confines the enrichment claim to the legal relationship in which the defect arose. It held that B is enriched by being freed from his obligation to compensate the lessor for any loss or damage in terms of the contract of lease underlying the cession.¹⁴³

Analysing the interests of the parties, the court referred to the situation where there is an *Anweisung* but the underlying *Deckungsverhältnis* is defective, which it regarded as the 'economically closest case'. The court said that the case here is like an *angenommene Anweisung*¹⁴⁴ because a certificate of insurance had been handed over to the cessionary, which strengthened the legal position of the favoured party but which, in the opinion of the court, does not change anything regarding enrichment. The court also considered that the argument that third party insurance (*Fremdversicherung*) is a special kind of contract in favour of a third party did not carry any weight.

The court also distinguished this case¹⁴⁵ from BGHZ 58, 184, in which a direct *condictio* against the third party was allowed in view of the requirement that the third party's right to claim should have its roots exclusively in the *Deckungsverhältnis* between the promisor and promisee and be totally independent of the *Valutaverhältnis* between the promisee and himself.¹⁴⁶ The ground for the distinction was that the economic focus of the performance-relationship in this case was not the legal relationship between the parties to this action but the contract of insurance between A and B.

At this stage, the German position may be summarised as follows: on the basis of the *Leistungsbegriff* and for other reasons,¹⁴⁷ a strong minority opinion favours a claim A–C in situations where B agrees to cede a non-existent claim

¹⁴² Cf Lorenz (1991) 1 *AcP* 279 at 299.

¹⁴³ At 52, where it cites Lieb (1990) 7 *Jura* 359 at 360 and Lorenz (1991) 1 *AcP* 279 at 299 ff.

¹⁴⁴ See pp 164–5 in Chapter Three above.

¹⁴⁵ At 53.

¹⁴⁶ See that judgment at 189 ff.

¹⁴⁷ See Flume (1999) 199 *AcP* 1, who supports a direct claim A–C but who does not justify this on the basis of the *Leistungsbegriff*.

against A to C. By a narrow margin, however, the majority of writers are of the view that A should direct his enrichment claim against B. They justify this conclusion by reference to the relative interests of the parties and by drawing analogies with the law concerning *Anweisung*-cases. The German courts agree with the majority opinion.

Although some of the arguments raised in German law will be discussed further when the approaches of the two legal systems are compared, several observations should be made at this stage.

The first relates to the important question of consistency. It is, of course, essential that like cases are treated alike. Any conclusions as to who can sue whom in this context must therefore accord with the rules developed in the context of the *Anweisung*-cases. As said above, it can be difficult in practice to distinguish cases where A performs to C due to an *Anweisung* or due to a cession.

The majority view is that this situation (i.e. where A performs to C following B's 'cession' of a non-existent right to C) is parallel to the situation where A performs to C on B's instruction (*Anweisung*) but the underlying relationship between A and B is defective.¹⁴⁸ There is undoubtedly merit in this argument. In both cases, after all, there is a defect in the relationship between A and B. In other words, the legal relationship that in a sense 'underlies' the cession/*Anweisung* is defective. That the factual circumstances are very close can be illustrated by comparing the insurance cases just discussed with the facts of the South African case of *Licences and General Insurance Co v Ismay*,¹⁴⁹ which was considered in the previous chapter: B instructed A to perform to C, in circumstances where A and B were not linked by any valid legal relationship. In a sense, B's notice to the debtor to perform to C as a cession has taken place (when it has not, due to a defect in the underlying relationship between A and B) is parallel to B's instruction to A to perform to C (where there is a defect in the underlying relationship between A and B).¹⁵⁰

¹⁴⁸ In other words, the situation dealt with in section 2 (a) of Chapter Three
¹⁴⁹ 1951 (2) SA 456 (EDL).

¹⁵⁰ Which would imply that a distinction should be drawn between cases where the notice was given to A by B and those where C notified A of the cession: cf Canaris's distinctions in cases where A performs too much – see p 384 below.

Flume, on the other hand, argues that the appropriate parallel is the situation where A performs to C in response to a defective *Anweisung*.¹⁵¹ In both the *Anweisung*-cases and those involving a cession, A performs to C rather than to B. In the first case, he performs to C because B has instructed him to do so. He could receive this instruction from B¹⁵² or via C.¹⁵³ In the second case, A performs to C because he has been told that he is obliged to do so as B's claim has been ceded to C. Again, he could receive this information from B or from C. The difference between the two situations relates to the fact that an *Anweisung* can be valid even if the underlying relationship (between A and B) is invalid. In other words, the principle of abstraction applies. There can thus be a situation where the underlying relationship between A and B is void, but B validly instructs A to perform to C. The abstraction principle applies in the context of cession in that B may validly cede a claim to C, even if the underlying obligatory agreement between B and C is void. Whereas there can be a valid *Anweisung* in the absence of a valid underlying relationship between B and A, however, there cannot be a valid cession in the absence of a valid claim between B and A (and, similarly, any notification to A would surely also 'ins Leere gehen'). The debtor's notification of the cession also has no independent legal existence. When B or C tells A to perform to C (as a consequence of the purported cession), this notification is as legally insignificant as the void cession (or a defective *Anweisung*). I tend to agree with Flume, therefore, that the most similar case is the one where the *Anweisung* itself is defective. Thus cases such as these should be compared with situations where, for example, A pays C on the basis of an unsigned cheque. In both cases, the factor that prompts A to perform to C is invalid: in the first case, the *Anweisung* is invalid;¹⁵⁴ in the second, the cession (and consequently A's notification thereof) is invalid.

It will be recalled from the discussion in Chapter Three that, according to the *herrschende Meinung*, A can sue C directly where the *Anweisung* itself is

¹⁵¹ In other words, the situation dealt with in section 2 (c) of Chapter Three.

¹⁵² For example, in a banking situation, a client may directly instruct the bank to make a transfer to C.

¹⁵³ For example, in a banking situation, a client may embody his instruction to his bank in a cheque, which he hands to C, and which C presents to the bank (either directly or via a collecting bank) for payment.

¹⁵⁴ In such cases, that the *Anweisung* is invalid is the crucial fact – the fact that there might be a valid underlying relationship between A and B is irrelevant as the absence of an *Anweisung* means that A's performance is not attributable to B. B is accordingly left out of the picture.

defective.¹⁵⁵ I agree with the minority view that A should thus be able to sue C in circumstances where B purports to cede a non-existent claim to C.

A second point that may be mentioned at this stage is that the question of B's enrichment is perhaps taken for granted by some writers.¹⁵⁶ In the car insurance case, B was enriched in that he was freed from his obligation to compensate the lessor (C) in terms of the contract of lease (B–C) underlying the cession. What would B have 'received' (as required in terms of § 812 BGB) if no liability had been extinguished? Larenz and Canaris recommend, as a last resort, that the enrichment of the cedent should merely be assumed in such circumstances.¹⁵⁷

Finally, it should be noted that the leading German cases concern insurance. In both cases, the court emphasised the risks that are typical in an insurance context. It may be, therefore, that a court would allocate the risk differently in a context other than insurance.

South African law

How does South African law deal with situations like this? First of all, it should be borne in mind that, in terms of South African law, unlike German law, contracts which are void *ab initio* attract different remedies to those which are voidable.¹⁵⁸ Thus, it can be expected that cases where a party (B) purports to cede a right that arises from a voidable contract (A–B) may be treated differently from those in which the 'right' in question supposedly stems from a contract (A–B) which was void from the outset.

The first possible difference between the two categories of cases concerns the related question of the legal validity of the obligatory agreement between B and C. If B agrees to cede a non-existent claim to C, he is agreeing to do the impossible.

¹⁵⁵ One way of explaining this is that the fiction (conjured up by a valid *Anweisung*) that, when A hands something to C, he performs to B and B performs to C does not apply. In the circumstances presently under consideration, this fiction also does not apply.

¹⁵⁶ But cf Lieb (1990) 7 *Jura* 359 at 360 and Lorenz (1991) 1 *AcP* 279 at 299 ff.

¹⁵⁷ See Larenz and Canaris *Schuldrecht* II/2 239: Es wäre 'weitaus besser, die Bereicherung des Zedenten im Wege einer "normativen Als-ob-Betrachtung" zu fingieren, als wegen der Schwierigkeiten mit diesem Problem die allein der Interessenlage entsprechende Lösung der h.L. aufzugeben.'

According to South African law, any agreement that envisages a performance that is initially and objectively impossible will be void *ab initio* – and not merely unenforceable, as it would now be in terms of German law.¹⁵⁹ Provided, therefore, that the claim in question (B–A) was already void or otherwise non-existent¹⁶⁰ at the time of conclusion of the obligatory agreement (B–C), and that it was thus impossible for B or anyone else to cede it, the obligatory agreement between B and C would also be void. It follows that such cases would constitute instances of *Doppelmangel*, which will be dealt with below.

There *are* certain situations, however, in which the obligatory agreement between B and C would be valid even if the object of the cession (the claim B–A) did not exist at the time of conclusion. Thus the agreement B–C would be valid where B either expressly or tacitly warranted the existence of the claim.¹⁶¹ If, for example, B agreed to sell a claim against A to C, their contract of sale included a warranty stating that the claim was valid, and the claim was in fact invalid (and therefore legally non-existent), their contract of sale would nevertheless be valid. In such circumstances, B would be guilty of breach of the contract of sale, and C would be entitled to cancel the contract and claim *restitutio in integrum* and/or damages.

B's obligatory agreement with C would also be valid if B's claim against A did exist at the time of conclusion of B's obligatory agreement with C, even if B's claim subsequently disappeared.¹⁶² Thus, for example, if B had a valid claim against A, and agreed to cede it to C, but the claim prescribed before the cession took place, the obligatory agreement would be valid and B's non-performance could constitute breach thereof. C would in theory therefore be entitled to cancellation (followed by *restitutio in integrum*) and contractual damages.¹⁶³

¹⁵⁸ See Chapter One above at p 20.

¹⁵⁹ See §§ 275 (1), 311a (1) BGB and pp 348-9 above.

¹⁶⁰ For example, where A and B in fact never even purported to conclude a contract, i.e. where the absence of a valid claim is a matter of fact and not merely a conclusion of law.

¹⁶¹ See Van der Merwe *et al Contract* 137. This is analogous to the situation envisaged in § 437 BGB (see note 76 above), i.e. one of the exceptional cases in which the obligatory agreement would have been valid even before the reform of the German law of obligations. It should be noted, however, that South African law requires conclusion of a warranty by the parties, whereas German law created a warranty of validity *ex lege*.

¹⁶² This was also the case under the old German law of obligations: see note 76 above.

¹⁶³ The remedy of specific performance would obviously not be available because the performance in question (i.e. cession of the avoided claim) is impossible.

A similar situation, which is both more likely and more difficult than this, arises when the claim that B agrees to cede to C is voidable. For instance, A, the owner of a successful racehorse, tells a wealthy acquaintance, B, that the horse is in excellent health. On the strength of this, B agrees to buy the horse for a small fortune. He then agrees to cede his claim against A to C, in exchange for a larger fortune. A's statements regarding the condition of the horse are, however, misrepresentations of the true facts; the horse had previously been lamed during a practice run and its racing days were already over when A agreed to sell it to B.

B's contract with A would thus be voidable on the grounds of misrepresentation. If the contract between A and B had already been rescinded when B agreed to cede the claim to C, then there would have been no claim (B-A) in existence and hence the agreement between B and C would be void for impossibility: again a case of *Doppelmangel*. Assuming, on the other hand, that B had not yet rescinded his contract with A at the time when he struck his agreement with C, the validity of the obligatory agreement (B-C) could not be impugned on the grounds of impossibility; at the time of conclusion thereof, it was possible for B to make the agreed performance, namely to cede to C his claim against A. Assuming that the contract was not void for some other reason,¹⁶⁴ C could therefore theoretically sue B for breach if B did not perform according to their agreement, provided that the contract A-B had not been rescinded.¹⁶⁵

But what would happen if B rescinded the contract with A *after* agreeing to cede his claim to C but before actually doing so? In other words, would rescission of the contract between A and B have any effect on the obligatory agreement between B and C? This situation is clearly not equivalent to the case where B's claim against A prescribed after he had concluded the obligatory agreement with C. That was a case concerned with the termination of an obligation (i.e. extinction *ex nunc*), whereas this is a matter of extinction of an obligation with retroactive effect (i.e. *ex tunc*). From a legal point of view, therefore, if the voidable contract between A and B is avoided, it is as if it had never been concluded at all. If rescission renders

¹⁶⁴ *Iustus error*, for example.

¹⁶⁵ In other words, B would be liable if he did not cede the claim at all, or arguably even if he ceded it: their agreement, after all, envisaged that B would cede a claim free of defects so cession of a voidable claim would probably also constitute breach. The issue of liability for latent defects should also be considered in this regard.

the contract between A and B a nullity, does it mean that B had no claim to cede to C and that his agreement with C is therefore void for impossibility? Or does the fact that B had a claim (albeit a voidable one) at the time when the obligatory agreement was concluded mean that this agreement is valid and remains valid even if the claim in question retroactively disappears? Could C sue B for breach if he did not perform according to their agreement in such circumstances? And what would happen if A, unaware of the rescission, performed to C? Finally, would it make any difference if it was A who was entitled to rescind the contract, and not B?

Situations where the contract between A and B was voidable

The then Appellate Division of the Supreme Court had to answer some of these questions in *Van Zyl v Credit Corporation of South Africa Ltd.*¹⁶⁶ In this case, the Tweeling Garage (B) sold a car to Van Zyl (A) in terms of a hire purchase agreement. In exchange, A traded in his old vehicle, and made a down-payment of £423. The remainder of the purchase price was to be paid off in monthly instalments. Having been informed that, shortly after conclusion of the agreement, B had ceded all its rights in terms of the contract (including the right of ownership of the car) to C, A paid two instalments to C. It then transpired that A had in fact been induced to enter into the contract on the basis of a material misrepresentation. This rendered the hire purchase agreement voidable at the instance of A. A claimed the repayment by C of the amounts paid to it. He also sought the setting aside of his contract with B and the return of his trade-in, or its cash equivalent, and his initial payment to B.

The court, *per* Steyn CJ, began by holding that whether a cessionary acquires a right *ex titulo oneroso* or *ex lucrativa causa*, if the right came into being on the basis of fraud, this fraud adheres to the right itself and not merely to the cedent.¹⁶⁷ The debtor is therefore entitled to raise the fraud as a defence to an action brought against him by the cessionary.¹⁶⁸ This, said the judge, is in accordance with the basic purpose of cession and the general principles that the cedent cannot transfer to the cessionary any right greater than that which he has himself, and that the debtor may

¹⁶⁶ *Supra*. The judge pointed out, at 587G-H, that he could not find any relevant common-law authority. This is the only South African case where someone purported to cede a right arising from a voidable contract.

¹⁶⁷ At 588G.

¹⁶⁸ At 588H.

not be disadvantaged by the cession.¹⁶⁹

The judge went on, however, to hold that a debtor, in the same circumstances, would not be entitled to use the fraud as basis for an action (as opposed to a defence) against the cessionary.¹⁷⁰ He stated that

[a]lthough the cessionary takes place of the creditor, and in this sense is a party to the contract, that position does not arise as a consequence of an agreement between the cessionary and the debtor, but by operation of law; [on the basis of] a special legal remedy which is granted to the cessionary, irrespective of whether the cession did not take place against the will of the debtor.¹⁷¹

In other words, A can sue only B on the basis of the fraud. If he were allowed to avoid the underlying contract, this would mean that both it and the rights arising therefrom would be retrospectively invalidated. If the cession consequently also fell away, with retrospective effect, C would surely therefore be liable to return payments to A. Indeed, the judge went on to say that A would have a claim against C (namely a *condictio indebiti* because there was an unowed payment – unowed because of the retrospective invalidation). In other words, A's remedies would be rescission and *restitutio in integrum* vis-à-vis B (i.e. B would have to return anything received under the contract and A would have to return the car to B) and a *condictio* against C (regarding the payments).

The main reason why the judge came to this conclusion seems to be that he considered that the imposition on C of a duty to restore (in terms of *restitutio in integrum*) would mean that the cession would have not only transferred a right but also a duty, which would be impermissible. This does not fit very comfortably with his assertions that the cedent's fraud adheres to the right itself and not merely to the cedent¹⁷² and that the cession does not cure the ceded right of defects and thus an incomplete right remains incomplete after the cession.¹⁷³ It could be argued that this idea that a duty to restore cannot be imposed on the cessionary is based on a

¹⁶⁹ At 588F-G.

¹⁷⁰ At 588H, 589B-C, 589D-E.

¹⁷¹ At 589A: 'Hoewel die sessionaris die plek inneem van die kontraktuele skuldeiser, en in dié sin deel het aan die kontrak, ontstaan daardie posisie nie as gevolg van 'n ooreenkoms tussen die sessionaris en die skuldeiser nie, maar uit hoofde van regswerking, van 'n besondere regsmiddel wat aan die sessionaris verleen word, onverskillig of die sessie al dan nie teen die skuldenaar se wil plaasgevind het'. (My translation.)

¹⁷² At 588G.

misconception. The rule that only rights and not duties can be ceded¹⁷⁴ must surely only refer to duties which arise *ex contractu* and not to general legal duties imposed by the law of contract.¹⁷⁵

His reasoning is interesting, however, as it seems to echo the German view that rights of recourse arising from the defect or failure of a contract should lie between the ostensible contracting partners. The disadvantages that flow from the defect (such as exposure to an action) should only affect the parties to that defective contract, as each had the opportunity to assess the other's character and creditworthiness during the pre-contractual negotiations. It is significant, however, that the judge only gave expression to these policy considerations vis-à-vis *restitutio in integrum* (which he confines to the relationship A–B), and not the *condictio* (which may apparently be brought against C), probably because *restitutio* is generally seen as a contractual remedy, whereas a *condictio* is not.¹⁷⁶

The court unfortunately did not explicitly deal with the question of the validity of the obligatory agreement between B and C. It therefore remains an open question whether C would be able to sue B for breach if B purported to cede to him a voidable claim that was subsequently avoided. Similarly, it is not clear whether A's performance to C would extinguish any debt owed by B to C. It seems unlikely that this would be the case, however, as South African law generally requires performance that corresponds exactly to the terms of the contract.¹⁷⁷ In other words, the only performance that would extinguish B's debt to C in terms of their obligatory agreement – if any existed – would be cession of a valid right against A.

Situations where the contract between A and B was void *ab initio*: *Doppelmangel*

Let us now consider cases where the contract between A and B was void *ab initio*, and not merely voidable, in order to see how our courts deal with a situation where

¹⁷³ At 589A–B.

¹⁷⁴ And, in any case, duties may be transferred, by assignment.

¹⁷⁵ In effect, therefore, the judge decided that the duty to restore in terms of *restitutio in integrum* derives from the contract itself.

¹⁷⁶ See the discussion in Chapter One above at p 20.

¹⁷⁷ *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A). Cf *datio in solutio*: see note 231 below. Cf the German law regarding *Leistungen an*

restitutio in integrum does not enter the picture. Technically, such situations would be classified as cases of *Doppelmangel* because the non-existence of a right to be ceded would preclude not only a cession but also an obligatory agreement between B and C (as any such agreement would be void for impossibility).

Such cases should therefore be compared with German cases of *Doppelmangel*. Most German writers do not deal with this situation as a separate category;¹⁷⁸ they seem to regard it as unimportant whether B and C were linked by an underlying obligatory agreement. What is most important is that there was a purported cession of a non-existent right. In any event, the result would be the same as the view of the majority: A should sue B, and B should sue C.

Decisions dealing with analogous facts¹⁷⁹ are *Hennie Slabbert Motors (Pty) Ltd v De Lange*,¹⁸⁰ *Koen v Goosen*,¹⁸¹ and *Santam Bank Ltd v Voigt*¹⁸² (in which B had no claim against A at all).

The first two cases (*Hennie Slabbert Motors (Pty) Ltd v De Lange* and *Koen v Goosen*) have almost identical facts and identical results. They do not deal with situations involving insurance claims, as encountered in the leading German cases, but rather with cession in the context of discounting arrangements. In both cases, a car-dealer B sold a car to the plaintiff A in terms of a hire purchase agreement. This contract, in each case, was void *ab initio* due to non-compliance with the section of

¹⁷⁸ *Erfüllungs Statt*: see Chapter One at p 37, and Flume's argument at p 354 above. An exception is Lieb, who says that, if the underlying contract between B and C is also invalid, the case will be one of *Doppelmangel*, and that A must sue B, and B must sue C: *Münchener Kommentar/Lieb* § 812 marg note 124a.

¹⁷⁹ But also see *Standard General Insurance Co Ltd v SA Broke CC supra*, the facts of which are similar to the case of Günter M. In this case, B took out a policy (with insurer A) insuring premises that were secured by a mortgage bond granted to B by a bank C. B was obliged in terms of its agreement with C to keep the premises insured against fire at all times. Also in accordance with the agreement with C, B ceded all its rights under the insurance policy, actual and contingent, to C. The policy was amended slightly at various stages but remained substantially the same. The Court held that the cession of the rights had taken place validly and that B accordingly had no right to institute a claim against A when the inevitable fire occurred. A did not make any payment (to B or C) in terms of the policy and the question of enrichment therefore did not arise. The court also did not deal with the reason why the insurance company did not pay for the fire damage, namely that it (the insurance company) was of the opinion that the fire had been caused by someone acting on behalf of B. This case is thus distinguishable from that of Günter M in that the cession took place before the fire, the court decided that there was a valid cession of a contingent right, and the cessionary C had not received any payment from A.

¹⁸⁰ *Supra*.

¹⁸¹ *Supra*.

the Hire Purchase Act¹⁸³ that made validity of the contract dependent upon the payment of a deposit. After the 'conclusion' of the hire purchase contract, the respective sellers purportedly ceded the rights supposedly arising from the contract to C, in terms of discounting arrangements. A accordingly made payments to C. A then sued B.

In the first case, *Hennie Slabbert Motors (Pty) Ltd v De Lange*,¹⁸⁴ A sought repayment of R950,60 which he had paid to C but he brought the action against B.¹⁸⁵ His first argument was that he had paid C because he was estopped from raising the invalidity of his contract with B in opposition to C's claim for payment.¹⁸⁶ The court held that there can be 'no question of an application of the principle of estoppel where there is in fact no obligation whatever upon a person to pay any amount whatsoever, but where he nevertheless chooses to do so for some reason or another' and therefore that he could not 'rely on estoppel to enable him to reclaim payment from a third party of any amount gratuitously paid by him'.¹⁸⁷

Secondly the plaintiff argued that his payments should be returned by B on the basis of *restitutio in integrum* as he had no other legal remedy against C.¹⁸⁸ Having pointed out that the contract in this case was void and not merely voidable,¹⁸⁹ the judge concluded that

restitutio can have no application in a case where a person voluntarily and while being under no legal or any other obligation to pay an amount does pay it but thereafter, and because he regrets having paid it, seeks to obtain repayment, not from the person to whom he mistakenly or voluntarily paid the amount but from a third party.¹⁹⁰

The court's decision therefore seems to be based on three grounds: that the remedy of *restitutio in integrum* only applies where a contract is voidable, that it can only be raised against the party to whom a payment was made, and that it is not

¹⁸² 1990 (3) SA 274 (F).

¹⁸³ Act 36 of 1942.

¹⁸⁴ *Supra*.

¹⁸⁵ Apparently because of a misunderstanding of *Van Zyl's* case, which was decided previously.

¹⁸⁶ At 46E-G.

¹⁸⁷ At 47C.

¹⁸⁸ At 47G.

¹⁸⁹ Thus distinguishing it from *Van Zyl's* case, in which *restitutio in integrum* was only relevant because the contract in question was voidable and not void: see the judgment at 47D-E and H.

¹⁹⁰ At 47H-48A.

available to someone who has made a payment gratuitously,¹⁹¹ mistakenly or voluntarily. The first of these grounds seems to be correct, according to the existing law of contract.¹⁹² The second is the most interesting, as the judge thus seems to suggest that the payment passes directly from A to C and thus that, if any action were to lie, it would lie against C.¹⁹³ It is unfortunate that the plaintiff had not raised the question of unjustified enrichment.

Unjustified enrichment formed part of the *ratio decidendi*, however, in the next case, *Koen v Goosen*.¹⁹⁴ In this case, the plaintiff paid R692 to the 'cessionary' C. He sought a declaration that his contract with B was void *ab initio* and, as in the *Hennie Slabbert Motors* case, he sued B for repayment. Corbett J (as he then was) held that the hire purchase agreement was void for non-compliance with the statutory provisions.¹⁹⁵ He decided, further, that C, as cessionary of the rights under the contract, 'was a necessary party and should have been joined'.¹⁹⁶ He went on to hold that

[t]he legal basis of plaintiff's claim for the R692 is one of the *condictiones*. Whether it be the *condictio sine causa* in the narrow sense ... or one of the other *condictiones* ..., it seems clear that in order to succeed the plaintiff must establish that the defendant was originally the recipient of that which is being reclaimed.¹⁹⁷

The judge even explicitly stated that '[i]f the plaintiff has any claim for repayment of this money, then, in my view, it lies, *prima facie*, against the recipient thereof, [C]'. Having held that the payment was made not to B,¹⁹⁸ but to C, who had not been cited as a party to the case, he dismissed A's appeal.

In the more recent case of *Santam Bank Ltd v Voigt*,¹⁹⁹ Mrs Voigt, a hairdresser, bought a car from a dealer, B, in terms of a credit agreement. B delivered the vehicle to Mrs Voigt and ceded its rights arising out of the agreement to

¹⁹¹ See 47C.

¹⁹² But cf Chapter One at p 20 and Chapter Three at p 332 above.

¹⁹³ In other words, corresponding to the minority opinion in German law: see pp 350 and 353 ff above.

¹⁹⁴ Interestingly, *Hennie Slabbert Motors (Pty) Ltd v De Lange supra* is not cited in the judgment.

¹⁹⁵ At 505D-F.

¹⁹⁶ At 509F-G.

¹⁹⁷ At 509H-510A.

¹⁹⁸ At 509H. He also considered the possibility that B and C could have had an arrangement, in terms of their discounting deal, that payment to C would constitute payment to B, but no evidence thereof had been placed before the court (see 510B-C).

Santam Bank. As security for her debt to Santam Bank, Mrs Voigt ceded to it a fixed deposit certificate issued by her bank, First National Bank.²⁰⁰ In other words, Mrs Voigt (A) originally owed the purchase price to the cedent B, but as a consequence of the cession, she acquired a new creditor, Santam Bank (as cessionary C). She made a payment to this new creditor by ceding it her claim against First National Bank. Shortly thereafter, the vehicle was damaged in an accident.²⁰¹

The main problem was that the credit agreement was invalid due to non-compliance with the requirements of the Credit Agreements Act.²⁰² The court held, therefore, that Mrs Voigt 'was entitled to cancel the cession and pledge and to recover from [Santam] ... the First National Bank deposit certificate,'²⁰³ thus confirming the decision of the court *a quo*. It is not clear why the court used the word 'cancel' in this sentence, as it had been prepared to hold that the agreement was 'invalid and of no force and effect and ... the cession and pledge was dependent upon the validity of the agreement'.²⁰⁴ There can, after all, be no cancellation of a transaction that does not exist. Be that as it may, what is important for our purposes is that the court was clearly prepared to allow Mrs Voigt to claim back the 'payment' she made to the supposed cessionary (C), although it did not identify this as an enrichment claim.

The court focused its attention exclusively on the relationship between the two parties to the litigation, namely Mrs Voigt and Santam. It did not consider the question of the validity of B's supposed cession to Santam. It seems obvious, however, that if the transaction between Mrs Voigt and B was invalid, then B's cession to Santam²⁰⁵ was also void. This also seems implicit in the court's conclusion that Santam was not entitled to retain Mrs Voigt's payment.

It is worth noting that the court did not say that Santam had been enriched at the expense of B, and that Mrs Voigt could only recover her payment by proceeding

¹⁹⁹ *Supra*.

²⁰⁰ For the facts, see pp 275-6 of the judgment (per Cooper J, Kannemeyer JP and Jansen J concurring).

²⁰¹ See 275I-276A.

²⁰² Act 75 of 1980. See p 279 of the judgment, particularly at F-H.

²⁰³ See 280H-I.

²⁰⁴ See 280H-I.

²⁰⁵ As well as the obligatory agreement between these two parties.

against B. It did not even consider this as a possibility.

Unjustified enrichment was raised, not by Mrs Voigt, but by Santam. It was argued by Santam's advocate that 'even if the agreement was invalid the Court *a quo* should not have granted the order it did since [Mrs Voigt's] ... tender of the damaged vehicle (for which it was said she had to account to [Santam] ...) was inadequate and she was obliged to compensate the appellant on the basis of unjust enrichment for her use and enjoyment of the motor vehicle ...'.²⁰⁶ This argument was roundly dismissed by the court because it had not been alleged that Santam owned the vehicle and therefore 'there was no legal ground on which [Santam] ... could base a claim against [Mrs Voigt] ... for delivery to it of the motor vehicle or bring an unjust enrichment action against [Mrs Voigt] ...'.²⁰⁷ The judge added that Mrs Voigt's claim did not depend upon her paying any compensation or offering to return the vehicle, but merely upon the invalidity of the agreement.²⁰⁸ He also summarily rejected the argument raised by Santam that Mrs Voigt was 'estopped from asserting the invalidity of the agreement'.²⁰⁹

Analysis

To sum up, then, the Appellate Division held that where B purports to cede a right arising from a voidable contract, A can bring a *condictio indebiti* against C. In the first two cases dealing with the situation where B purports to cede a right arising from a void contract, A's claim failed because, in each case, it was directed against B rather than C. In the third such case, on the other hand, A succeeded in suing C. The cases thus suggest that our courts would prefer a claim A–C in such circumstances. The only case which was decided on the basis of the rules of unjustified enrichment, however, was *Koen v Goosen*.²¹⁰ In that case, it was held that A could not sue B as B was not the *recipiens*, but that A might have succeeded in bringing an enrichment action against C.

This conclusion is supported by the application of the general principles of enrichment liability. As was shown in the previous chapter, the current approach of

²⁰⁶ See 280I–J.

²⁰⁷ See 281C–D.

²⁰⁸ At 281D.

²⁰⁹ At 281E–F.

²¹⁰ *Supra*.

our courts is to emphasise the requirement that the defendant be enriched. C would be the enriched party in such circumstances. B would not be enriched in any way as A's performance to C arguably did not extinguish any contractual liability owed by B to C. (In the case where the contract A-B was void, there was no valid contract between B and C as their agreement would be void for impossibility. In the case where the contract A-B was voidable, it is unclear whether an obligatory agreement between B and C would be valid or not. In any event, performance by A would not correspond exactly to the terms of any such agreement, and would therefore not extinguish B's liability).²¹¹ Nor would B be impoverished; C would be enriched at A's expense. C's enrichment would also be *sine causa* as the performance would not have taken place in terms of a valid contractual or other legal obligation.²¹² In short, the general principles would clearly lead one to conclude that A could bring an enrichment claim directly against C.

It also appears that A could bring one of the *condictiones* against C. Thus for example, A could argue that there was a *datio* between himself and C as he handed money or other property to C. If he could show that this performance was unowed and that it took place as a result of an excusable error, for example, he would arguably be entitled to bring a *condictio indebiti* against C.²¹³ If A were to sue C with a *condictio sine causa specialis*, on the other hand, it would have to be with the 'rag-picker' form of this action, as the circumstances do not match any of the other situations where this remedy is generally regarded as being available.²¹⁴

It should be borne in mind that the courts do not interpret the requirement that a *condictio* can only lie between the *solvens* and the *recipiens* of a *datio* in a literal way. The *recipiens* need not be the person who has actually received ownership of whatever was transferred.²¹⁵ Similarly, as was argued in the previous chapter, the

²¹¹ See *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra*. Even if C accepted A's performance as a *datio in solutio*, this would only amount to conditional performance: see Van der Merwe *et al Contract* 483. The argument that B had received an enrichment claim (or its value) against C would not carry water in South African law. See, e.g., the rejection by Conradie J of an analogous argument in *Standard Bank v Haskins* Case No 4688/90 11 April 1991, unreported, as discussed in Chapter Three above.

²¹² There was neither a contract between A and B, nor (at least in the case where the contract between A and B was void *ab initio*) an obligatory agreement between B and C. Moreover, there was no contract or other *causa* between A and C.

²¹³ Cf Chapter One at pp 7-8.

²¹⁴ See Chapter One at p 9 and Chapter Three at pp 305 ff.

²¹⁵ See, e.g., *Phillips v Hughes*, *Hughes v Maphumelo* 1979 (1) SA 225 (N) at 228A; *Licences*

solvens need not be the person who actually transfers ownership.²¹⁶ It should rather be asked whether A's performance can be attributed to B, and whether B or C should be regarded legally as having received the performance. In the circumstances presently being considered, there does not appear to be any justification for regarding A's performance as being attributable to B. There is no relationship akin to agency or a fiduciary relationship²¹⁷ or a *delegatio solvendi*²¹⁸ between A and B. *Koen v Goosen* would accordingly probably still be decided the same way today.

According to both the traditional rules and the general principles of enrichment liability, therefore, A should sue C. This is consistent with the solution suggested (in Chapter Three) for cases where A performs to C on the basis of an invalid instruction.²¹⁹ This is the result favoured by the minority of German lawyers in cases where only the relationship between A and B is invalid. As mentioned above,²²⁰ it could be argued that the relevant South African cases are not on a par with that situation, because the relationship between B and C would also be void (for impossibility).²²¹ This is not a valid argument, however, because at the time when most of the leading articles on this topic were written, a contract to cede a non-existent right would generally have been regarded as void for impossibility in German law. Although, as explained above, there were exceptional circumstances in which such a contract would have been valid, the validity or otherwise of the obligatory agreement does not appear to have featured much in the discussion.²²² The crucial question was whether or not there was a valid claim to be ceded.

But what about the policy arguments raised by Canaris? It is argued that A

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- and General Insurance Co v Ismay* 1951 (2) SA 456 (EDL).
- ²¹⁶ See, for example, pp 203 ff and 303 ff above. Also cf *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A).
- ²¹⁷ As required by the Appellate Division in *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd supra*.
- ²¹⁸ Cf Chapter Three above. Also compare the arguments at the end of the discussion of German law at p 360 ff above – although the notification of A of the cession may, in factual circumstances, be similar to an *Anweisung*, it must surely be invalid.
- ²¹⁹ See section 2 (c) in Chapter Three above.
- ²²⁰ At p 368.
- ²²¹ At least in cases where the contract between A and B was void. It seems, from *Van Zyl's* case *supra*, that the court might also regard the relationship B–C as being void where the contract between A and B was voidable.
- ²²² Cf *Münchener Kommentar/Lieb* § 812 marg note 124a, where he says that, if the underlying contract between B and C is also invalid, the case will be one of *Doppelmangel*. In any event, the result would be the same, according to the majority: A must sue B, and B must sue C. See Lieb *loc cit*.

should sue B rather than C, because he should not be required to bear the risk of C's loss of the enrichment or the risk that C might go insolvent or disappear.²²³ This point of view is justified, firstly, by the general rule that a debtor's legal position should not be made worse by the cession and, secondly, by the argument that equity demands that an enrichment claim should be confined to the defective 'causal relationship' in question.

Regarding the first of these justifications,²²⁴ Flume argues that having to sue C rather than B might be to A's advantage in that a cessionary would frequently be in a better financial position than a cedent. This would often be true. For example, if B is under 'prickling creditorial pressure',²²⁵ and cannot perform to his creditor C, he might purport to cede a non-existent claim to him. In such circumstances, A would be better off with an enrichment claim against C rather than B. In the 'fire insurance case', for instance, the insurer would have preferred to have an enrichment claim against the supposed cessionary than one against the fraudulent Günter M.

As Flume concedes, however, this will not always be the case. Sometimes the supposed cessionary will be less solvent, or more likely to disappear, than the supposed cedent.²²⁶ On balance, however, the interests of A – who would generally be the most vulnerable party – are arguably best protected by allowing him a direct action against the recipient of his performance.

This solution is also supported by the policy argument (raised in the context of *Doppelmangel* in the previous chapter)²²⁷ that a direct claim A–C is preferable in that it entails less litigation and consequently fewer legal expenses.

While it can certainly be argued, on policy grounds, that directing enrichment claims 'via the triangle' (i.e. A–B–C) is the best way to achieve an overall balance of

²²³ See p 352 above.

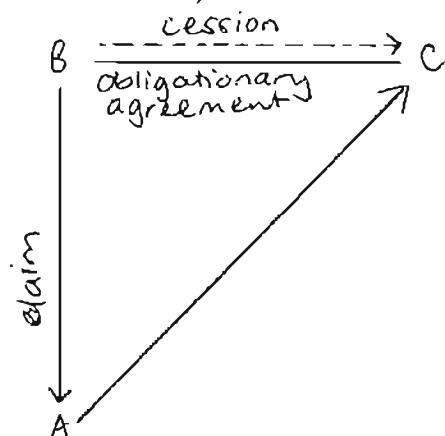
²²⁴ Although it is a rule of the law of cession and there is no cession in these circumstances, it is correct to apply the rule in this context: if a debtor should not be disadvantaged by a cession, a supposed debtor should *a fortiori* not be disadvantaged by a supposed cession. It is also correct to focus on the interests of the debtor, as he is in the most vulnerable position.

²²⁵ To borrow a phrase used by Holmes JA in *S v Graham* 1975 (3) SA 569 (A) at 571.

²²⁶ Should the direction of A's claim therefore be made to depend on the facts of each case? In other words, should the claim against C be allowed only if A's position would not be worsened by having to sue C? This would clearly be neither equitable nor practical. For example, it would make C's liability dependent on his financial situation relative to B's.

the interests of the parties, our legal principles do not allow this. Altogether, it seems that our courts would be more likely to grant A an enrichment claim against C than to require A to sue B.

2 **Only the cession itself (i.e. the transfer agreement or *Zessionsvertrag* between B and C) is invalid or absent**



In the situation to be dealt with here, both the claim to be ceded (A–B) and the obligatory agreement to cede (B–C) are valid, but the cession has not validly taken place.²²⁸ A nevertheless ‘performs’ to C. The situation envisaged here is similar to the one discussed above in that there is no valid cession. Here, however, its invalidity is not due to the absence of a valid claim to be ceded (i.e. the purported cession does not lack an object), but arises for some other reason. For example, B has a valid claim against his insurer A. B agrees to cede this claim to C (i.e. the parties have concluded a valid obligatory agreement). The cession, however, does not take place because B, due to a *reservatio mentalis* on his part, does not form the *animus cedendi*. Or the cession may not take place because the cedent lacks the capacity to act, because he had either become insolvent or insane by the time he purported to conclude the agreement of transfer.²²⁹ Yet another illustration might be invalidity due to a lack of consensus.²³⁰ For instance, B and C discuss the cession of

²²⁷ At p 314 ff.

²²⁸ In many cases, both the obligatory agreement and the cession would be invalid e.g. if the cedent lacked capacity when he concluded both the obligatory agreement and the agreement of transfer (e.g. where the cedent was a minor at both times, assuming that the two transactions were not simultaneous).

²²⁹ But had had the requisite legal capacity at the time when the obligatory agreement was concluded.

²³⁰ The contract would, in certain circumstances, be void according to South African law. In German law, it would at most be voidable: § 119 BGB.

several claims against various debtors. If B intends to cede a claim against debtor A and C intends to acquire a claim against the more creditworthy debtor X, there will be no valid cession because there was no meeting of the minds of the parties.

In certain circumstances, A's performance would extinguish B's liability to C.²³¹ If B's liability were not discharged by such performance, however, C would theoretically be entitled to sue B for breach of the obligatory agreement to cede. He could thus claim specific performance of the agreement itself. This would take the form of cession of the claim B–A. C has, however, received the ultimate object of the obligatory agreement and the envisaged cession, namely the performance of the debtor A (in terms of the claim held against him). The only reason why C might go to the trouble of claiming specific performance²³² in such circumstances would be to 'justify' his retention of the performance made to him by A. If C were allowed to retain the performance without receiving cession,²³³ on the other hand, there would be no point in suing for specific performance and it would also be questionable whether he would have suffered any quantifiable loss, and therefore whether he would be entitled to claim contractual damages. Can C retain the performance, or will he be forced to give it up by means of an enrichment claim?

German law

Few German writers deal with this situation. Lieb, in the *Münchener Kommentar*, and Larenz and Canaris, in their textbook, state that if the cession itself is defective (without specifying whether the underlying obligatory contract is valid or not), then a direct claim A–C will be allowed.²³⁴ In other words, a debtor who has

²³¹ Regarding German law, cf Chapter One at pp 37–8 concerning *Leistungen erfüllungshalber* and *Leistungen an Erfüllungs Statt*. Also see Larenz and Canaris *Schuldrecht II* 238. As a general rule, South African law requires exact performance in terms of a contractual obligation: see, e.g. *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra*. The creditor may, however, accept a different performance (a *datio in solutum*), in which case the obligation will be conditionally extinguished: see Van der Merwe *et al Contract* 483.

²³² Bearing in mind that, in South African law at least, assuming that the party claiming performance has himself already performed in terms of any reciprocal obligation (and therefore that the *exceptio non adimpleti contractus* and the related principle of reciprocity will not provide any assistance), specific performance can only be enforced by an order of court. For C to claim specific performance, therefore, he would incur legal expenses, which could be considerable.

²³³ In other words, were he not required to obtain specific performance in order to justify retention of A's performance: see note 231 above.

²³⁴ *Münchener Kommentar/Lieb* § 812 marg note 124c; Larenz and Canaris *Schuldrecht II* 2

performed to a supposed cessionary would be entitled to a direct *condictio* against him.²³⁵ He would thus not be forced to proceed ‘via the triangle’, i.e. to sue B who would in turn have a claim against C.

Lieb justifies this conclusion by drawing an analogy with the situation where an *Anweisung* is invalid or absent.²³⁶ If there is no valid *Anweisung*, the argument goes, there is no justification for requiring A to seek recourse from B instead of C. If there is no valid cession, therefore, there can similarly be no justification for bringing B into the picture, and A should be permitted to sue C directly.

The justification given by Larenz and Canaris for this point of view is more complex. They state that allowing a direct action ‘is self-evident in the case of defects of “attributability”, but might also apply without limitation where there are defects in validity, because in this case – in contrast to the case of the *Anweisung* – these concern a legal act between the cedent and the cessionary themselves and there is no protection of reliance against such “direct” defences’. (My translation.)²³⁷ What this rather cryptic sentence seems to mean, firstly, is that if, due to the nature of the defect in question, the performance cannot be attributed to the cedent,²³⁸ then he cannot be drawn into the process of ‘unravelling’ the enrichment. In other words, an action should lie against the cessionary rather than the cedent. Examples of defects of ‘attributability’ (i.e. *Zurechenbarkeitsmängeln*) would be lack of capacity to act, duress or other defects of will (*Willensmängel*).²³⁹ A performance can therefore not be attributed to a cedent who lacks the capacity to act, or who has attempted to cede a claim under duress. The reasoning thus seems to be that if a party (B), who is entitled to a performance, ‘redirects’ that performance to a third party (C) in

239.

²³⁵ *Münchener Kommentar/Lieb* § 812 marg note 124c; Larenz and Canaris *Schuldrecht II/2* 239; Flume (1999) 199 *AcP* 1 at 25. The court, in BGHZ 113, 62, also seems to support this view (at p 70).

²³⁶ *Münchener Kommentar/Lieb* § 812 marg note 124c. See section 2 (c) in Chapter Three above.

²³⁷ At 239: ‘Das ist bei Zurechenbarkeitsmängeln eine Selbstverständlichkeit, dürfte aber auch bei Gültigkeitsmängeln uneingeschränkt gelten, da diese hier – anders als bei der Anweisung – ein Rechtsgeschäft zwischen dem Zedenten und dem Zessionar selbst betreffen und es gegenüber derartigen “unmittelbaren” Einwendungen keinen Rechtsscheinschutz gibt’.

²³⁸ Cf discussion in Chapter One above at p 49 ff, Chapter Two at pp 153, 157 and 160, and Three at pp 271 and 305.

²³⁹ See A Hueck and C-W Canaris *Recht der Wertpapiere* 11 ed (1977) 141-2. See A Hueck and C-W Canaris *Recht der Wertpapiere* 11 ed (1977) 132 ff for a more detailed explanation of these concepts.

circumstances where B's acts would be disregarded by the law in any other context (as he was not exercising his will freely or because his acts are legally non-existent as he did not have the capacity to act), B's act of 'redirection' should similarly be disregarded here. Consequently, the law should ignore any acts of B, and should regard the situation as though A made a performance to C without reference to any act of B.

So much will be familiar from the discussion of the views of Larenz and Canaris in previous chapters. Here, however, they argue that a direct action against the cessionary should be granted to A even if the defect in question is *not* one which prevents the attribution of the performance to the cedent (i.e. a *Zurechenbarkeitsmangel*), but is a 'validity-defect' (*Gültigkeitsmangel*). Such a defect would imply that the cession has either not taken place at all or it is regarded by the law as being void (i.e. legally non-existent) for some reason other than legal incapacity, duress or another defect of will. The presence of a validity-defect usually results in the application of the *Rechtsscheintheorie*, i.e. the protection of the reliance of the *bona fide* recipient.²⁴⁰ As was pointed out previously, this theory is of general application and is not limited to the law of enrichment.²⁴¹ Thus, for example, if X borrows a horse from Z and sells it to Y, who is unaware that X has merely borrowed and does not own the horse, and then Z tries to claim it back from Y, Y can call upon the protection of the *Rechtsscheintheorie* and Z's claim will fail. The *Rechtsscheintheorie* only applies, however, if the relevant defect (i.e. the one which has resulted in invalidity) arises from a prior relationship and not if it arises from the relationship between the two parties in question.

They therefore distinguish this case from that of an invalid or absent *Anweisung* on the grounds that, unlike an *Anweisung*, a cession embodies a legal act (*Rechtsgeschäft*) between the cedent and cessionary themselves and the doctrine of reliance (*Rechtsscheinschutz*) can therefore be of no assistance.²⁴² In other words, if a supposed cessionary were to argue that he relied on the appearance of cession, and therefore that he should be entitled to retain what he has received as a consequence, the other party could counter this argument by raising the lack of a valid transfer. If,

²⁴⁰ See Chapter One at p 49 ff above.

²⁴¹ See Chapter One at p 49 ff.

²⁴² Larenz and Canaris *Schuldrecht* II/2 239.

on the other hand, C were to say that he relied on the appearance of an *Anweisung*, his reliance might be protected and his opponent would have no countervailing defence.

In a nutshell, Larenz and Canaris are of the view that the debtor A should be allowed a direct action against the cessionary C, regardless of the reason for the invalidity of the cession, because his (i.e. C's) reliance on the appearance of legal compliance is not worthy of protection in such circumstances.

As a further argument in favour of the debtor's having a direct action against the supposed cessionary, Flume²⁴³ cites § 409 BGB.²⁴⁴ This provision, which is aimed at the protection of the debtor, lays down that if a cedent gives his debtor notice of the cession (or purported cession) of a claim against him,²⁴⁵ the cession will be effective vis-à-vis the original creditor even in circumstances where it would have otherwise been invalid.²⁴⁶ In other words, once the cedent has given the debtor notice of the cession, he can no longer sue the debtor for performance of the claim. Effectively, therefore, once the cedent has given the debtor notice of the cession, he cannot expect the debtor to be satisfied with a mere enrichment claim against the apparent cessionary and demand that the debtor make a second payment of the debt, this time to himself (the supposed cedent).²⁴⁷ Flume argues that this provision is aimed solely at the protection of the debtor and that he can, therefore, renounce his right to this protection and thus claim the payment from the pseudo-cessionary with an enrichment action.²⁴⁸

²⁴³ *AcP* 199 (1999) 1 at 25.

²⁴⁴ § 409 BGB '[Abtretungsanzeige] (1) Zeigt der Gläubiger dem Schuldner an, daß er die Forderung abgetreten habe, so muß er dem Schuldner gegenüber die angezeigte Abtretung gegen sich gelten lassen, auch wenn sie nicht erfolgt oder nicht wirksam ist. Der Anzeige steht es gleich, wenn der Gläubiger eine Urkunde über die Abtretung dem in der Urkunde bezeichneten neuen Gläubiger ausgestellt hat und dieser sie dem Schuldner vorlegt. (2) Die Anzeige kann nur mit Zustimmung desjenigen zurückgenommen werden, welcher als der neue Gläubiger bezeichnet worden ist.' ('[Notice of assignment] (1) If the creditor notifies the debtor that he has assigned the principal debt, the assignment of which he has given notice is effective against himself in favor of the debtor, even though the assignment was not made or is ineffective. It is equivalent to notice, if the creditor has delivered a document of assignment to the assignee named in the document, and the latter presents it to the debtor. (2) The notice may be revoked only with the consent of the person who has been named as the assignee.' (Transl Forrester *et al* (n 57).)

²⁴⁵ Either directly or by means of a written document handed to the new creditor (cessionary) who in turn presents it to the debtor.

²⁴⁶ Or where it did not take place at all.

²⁴⁷ (1999) 199 *AcP* 1 at 25.

²⁴⁸ Flume (1999) 199 *AcP* 1 at 25.

The view that A will have a direct enrichment claim against C has also received the imprimatur of the *Bundesgerichtshof* in an aside in the notorious case of BGHZ 113, 62,²⁴⁹ to the effect that 'where there is a cession that has been accepted in error, the *Leistung* made to a supposed cessionary can be claimed back from him with a *condictio*'.²⁵⁰

In conclusion, according to the *herrschende Meinung*, A may bring an enrichment action against C in such circumstances.

South African law

As yet, this situation has not been the subject of an enrichment case in South Africa. This is, however, probably not due to the improbability of such factual constellations arising, but rather due to the uncertainty of the whole area of enrichment law (and hence the parties' willingness to settle matters rather than incur the inevitably high legal costs that follow legal battles that are waged all the way up the hierarchy of courts). There is no shortage of cases concerning invalid cessions, and a debtor could easily make a payment to a supposed cessionary in the absence of a valid cession.

The problem at hand can be illustrated by the analogous legal situation which gave rise to the constitutional case of *Brink v Kitshoff NO*.²⁵¹ According to certain provisions of the Insurance Act,²⁵² if a husband ceded the benefits of his life insurance policy to his wife, she would only be entitled to R30 000 of the benefits if his estate were sequestrated more than two years after the cession, and if this happened less than two years after the cession, she would not be entitled to anything at all. The residue or the whole amount, as the case may be, was in such situations deemed to fall into the husband's insolvent estate. While the cession was not invalid,

²⁴⁹ As discussed in Chapter Two above at p 154 ff. (This was the case in which a former employee of a company in liquidation claimed compensation from an architect formerly employed by a firm which had carried out a mandate for the liquidated company. The architect submitted the claim to his insurer, who paid the claimed amount to the architect's supposed creditor, only to find out that the claim had in fact not existed.)

²⁵⁰ The court refers to Lieb's discussion in the *Münchener Kommentar* at § 812 marg note 123 as authority.

²⁵¹ 1996 (4) SA 197 (CC).

the envisaged result (viz entitlement of the cessionary to claim all the benefits as creditor) was legally either partially or totally impossible. This produced a situation analogous to the one we are dealing with here: B purported to cede a valid claim against A to C, in terms of a valid obligatory agreement, but the cession was practically (though here not legally) ineffective. The insurer could easily have mistakenly made a payment to C (the wife). Such a situation could of course not arise now, as the relevant provisions of the Insurance Act were declared invalid (on the grounds of inequality) by the Constitutional Court in this case, but it serves to illustrate the kind of problem that could arise. How, then, should such situations be approached in South Africa?

Essentially, the difference between situations 1 and 2 is that in the first, the cession (B–C) is invalid because there is no valid claim (B–A) to be ceded, whereas, in the second situation, there is a valid claim but the cession is invalid for some other reason. What this means is that in one case the debtor performs where he has no obligation to do so, and in the other he makes a performance which he is obliged to make, but to the wrong person (the supposed cessionary rather than the creditor). Does the existence of an obligation between A and B justify treating this case any differently from the situation where there is no such obligation?

As said above, the prevailing opinion in German law is that A should be allowed to sue C directly in such circumstances. In my view, the most convincing argument²⁵³ in favour of this outcome is that this situation is analogous to the case of a defective or absent *Anweisung* (in which case it is agreed that A should sue C).²⁵⁴ It was argued that situation 1 (namely, cession of a non-existent right) was also analogous to the situation where A performs to C in the absence of a valid *Anweisung*. It was suggested that a cession is analogous to an *Anweisung* because they constitute the factors that prompt A to perform to C and not to B. A defective cession should therefore be analogous to a defective *Anweisung*. In situation 1, the cession was void because it had no object. In this situation, the cession is void for some other reason.

²⁵² Act 27 of 1943.

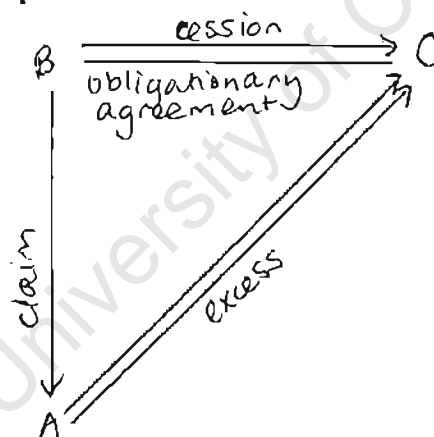
²⁵³ And most useful, from a South African point of view.

²⁵⁴ See section 2 (c) in Chapter Three.

In situations where A performs to C thinking that he was validly instructed to do so by B, whereas B made no valid *Anweisung*, the crucial fact is that B did not make a valid *Anweisung*. The ground for its invalidity is irrelevant.²⁵⁵ Thus, for example, A is allowed to sue C directly whether B made an instruction that was void for non-compliance with formal requirements (e.g. he made out a cheque but did not sign it), or whether B made an instruction under duress, or whether B did not make any instruction at all but the bank acted in terms of a forged instruction. It could thus be argued that what is important here is that the cession (i.e. the factor which prompted A to deflect his performance to C) was void; the reason why the cession was void should be irrelevant.

On the grounds of consistency and therefore, I think that such cases should be treated in the same way as the situations in section 1 above.²⁵⁶ A should be able to bring an enrichment action against C.²⁵⁷

- 3 All the legal relationships between A and B, and B and C are valid, but A has performed more than he was required to perform to C



Let us imagine that A owes B R1 000 and, the debt having been validly ceded to C,

²⁵⁵ See the examples of invalid *Anweisungen* given on pp 263-4 above.

²⁵⁶ And cases of defective instructions: see section 2 (c) in Chapter Three.

²⁵⁷ Thus, for example, provided that A could prove that he made the performance on the basis of an excusable error, he could bring a *condictio indebiti* against C: he made a *datio* to C and that *datio* would be *indebite* vis-à-vis C. It could also be argued that the *condictio sine causa specialis* would lie against C: see section 2 (c) in Chapter Three. In certain exceptional circumstances, however, A might be able to sue B. This sort of situation would arise if A's performance extinguished B's debt to C (e.g. by way of the rules concerning *datio in solutum*, or third party performance). As A's performance would arguably not be attributed to B in such circumstances (as there is no relationship between A and B analogous to agency or a fiduciary relationship – cf p 374 above), A could only sue B if the requirements of

A performs to C. Instead of transferring only R1 000 as agreed, however, he mistakenly transfers the same amount twice. Or, he makes a typographical error and R11 000 is transferred instead of R1 000.²⁵⁸ In other words, although all the relevant legal relationships are valid, A has performed too much to C.

It seems to be generally accepted in German law that, in such cases, the debtor may sue the cessionary directly on the basis of unjustified enrichment.²⁵⁹ The main argument in favour of this solution is that it is consistent with the law regarding the *Anweisung*-situations:²⁶⁰ such cases are regarded as analogous to cases of a performance in the absence of a valid *Anweisung*, where a direct action (A–C) would also be allowed.²⁶¹ It is also consistent with Canaris's ideas on the attributability of a performance. Here, again, there is no ground for arguing that the debtor's overpayment should be attributed to the cedent: the debtor's relationship to the cedent is irrelevant or superfluous in these circumstances, as the defect only exists in the relationship between the debtor and the cessionary.

It should be noted that Canaris himself confines this direct action to cases where the overpayment stemmed from a defect in the relationship between A and C, or where the overpayment results from the debtor's own mistake, as in the examples given above. Therefore, for example, he should be able to bring the *condictio* directly against C if C told him that a cession had taken place, or showed him documentary evidence of the obligatory contract. If, on the other hand, the debtor's misapprehension derives from his relationship to B,²⁶² the defect in question lies within this relationship and Canaris is of the view that the debtor should therefore be confined to bringing an enrichment claim against the cedent in such a case.²⁶³ This, again, would be consistent with his view that potential enrichment actions should be limited to the parties to a defective causal relationship and the allied notion of attributability.

negotiorum gestio (whether in its proper or its extended form) were met.

²⁵⁸ Elaboration of examples mentioned by Larenz and Canaris *Schuldrecht* II/2 at 239.

²⁵⁹ C-W Canaris 'Der Bereicherungsausgleich im Dreipersonenverhältnis' in *Festschrift Karl Larenz zum 70. Geburtstag* (1973) 799 at 836; *Münchener Kommentar/Lieb* § 812 marg note 124c; *Jauernig/Schlechtriem* § 812 marg note 46; Larenz and Canaris *Schuldrecht* II/2 239; *Staudinger/Lorenz* § 812 marg note 41; Lieb (1990) 7 *Jura* 359 at 361.

²⁶⁰ Canaris (n 259) 836; Larenz and Canaris *Schuldrecht* II/2 239.

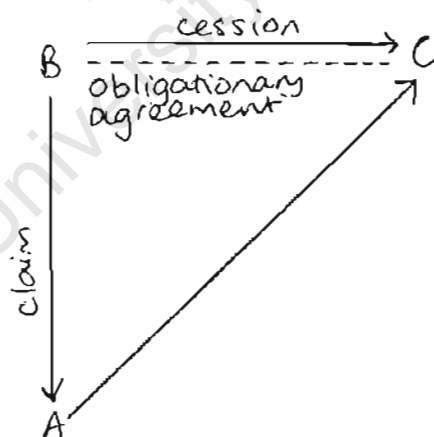
²⁶¹ See section 2 (c) in Chapter Three above.

²⁶² E.g. if the debtor assumes from the outset that he owes the cedent more than he in fact does: see Larenz and Canaris *Schuldrecht* II/2 239.

That the approach of the court is consistent with Canaris's opinions²⁶⁴ and with the conclusion of the *herrschende Meinung* that A should be allowed to sue C is illustrated by the Share-of-profits case.²⁶⁵ B ceded a claim to an as yet undetermined share of profits to C. The debtor A paid the cessionary, due to his exerting pressure on him. When the share of the profits was subsequently established, it turned out that the debtor had paid more than necessary. The court, in allowing the debtor to sue the cessionary, was influenced by the parties' awareness of the uncertainty regarding the amount and by the fact that it was the cessionary rather than the cedent who precipitated the overpayment.

Again, there are no South African cases that deal directly with this question. On the basis of consistency, however, one would have to argue that such situations should be dealt with in the same way as those in the two previous sections (and the cases where there was no valid *Anweisung*): A should in principle be able to sue C. Clearly, in such circumstances, C would be enriched by A's performance; A would be impoverished; and the enrichment would be *sine causa*.²⁶⁶

- 4 **B has a valid claim against A, which he validly cedes to C. The underlying obligatory contract between B and C is, however, invalid**



²⁶³ Larenz and Canaris *Schuldrecht II/2* 239.

²⁶⁴ See Larenz and Canaris *Schuldrecht II/2* at 239: 'The decision of the BGH therefore totally corresponds to the line represented here, according to which it depends in which relationship the defect had its origin'. ('Die Entscheidung des BGH entspricht daher ganz der hier vertretenen Linie, wonach es darauf ankommt, in welchem Verhältnis der Mangel seinen Ursprung hat'.)

²⁶⁵ BGH NJW 1989, 161. For a summary, see Larenz and Canaris *Schuldrecht II/2* at 239.

²⁶⁶ Although all the contracts were valid, they would not cover the excess.

In contrast to the first situation discussed above,²⁶⁷ the cedent B has a valid claim against A, i.e. there is an 'object' (*res incorporales*) that can be ceded. While the agreement to cede (i.e. the obligatory agreement between B and C) is defective, the cession itself is valid, as a consequence of the principle of abstraction, as explained in the introductory part of this chapter.²⁶⁸ For example, B owns a small business and wants to sell it to C. After lengthy negotiations, C agrees to buy the business and to pay the purchase price in three equal instalments. The parties ask a lawyer to reduce their agreement to writing. Embedded in the contract of sale is a clause saying that B agrees to cede to C any outstanding debts owed to the business by customers. B subsequently transfers the business, and cedes the relevant debts, to C. A customer, A, pays C what he owes the business. It is then discovered that the contract of sale was void *ab initio*, due to uncertainty regarding the dates of payment.²⁶⁹ Assuming that the agreement to cede was not severable from the rest of the contract, it would be as invalid as the contract of which it formed a part. Due to the operation of the principle of abstraction, however, the cession would nevertheless be valid.

This rather improbable scenario has understandably received very little attention from German commentators. Without explaining why, Lieb states that in such a case the cedent should be granted a claim (a *Leistungskondition*) against the cessionary.²⁷⁰ If we consider the relationship A–C, C has a valid claim against A and A has performed in terms thereof. C is therefore not unjustifiably enriched vis-à-vis A. Turning to the relationship B–C, on the other hand, C has received something (namely, the right against A) from B without legal ground and B should therefore be able to sue him for unjustified enrichment.

One of the reasons why such cases are rare in Germany is that the principle of abstraction is usually of no consequence in instances of fraud.²⁷¹ Cases like the following would therefore be regarded as falling outside the category of cases

²⁶⁷ At p 346 ff.

²⁶⁸ See p 340 above and § 409 BGB.

²⁶⁹ Cf, e.g., *Patel v Adam* 1977 (2) SA 653 (A).

²⁷⁰ *Munchener Kommentar/Lieb* § 812 marg note 124.

²⁷¹ See, for example, Scott *Cession* 82n76, who says that the abstraction principle does not apply in German law in cases of fraud, mistake or where the underlying agreement is *contra bonos mores*. More accurately, instances of fraud or mistake may invalidate both the obligatory and real agreements. Also see Chapter One at p 19.

presently being considered: B, who has a valid claim against A arising from a contract of loan, fraudulently misrepresents to the representative of C company that the right is worth more than it actually is, or that A is more creditworthy than he is in fact. On the basis of the misrepresentation, C agrees to 'buy' the right from B (i.e. they conclude an obligatory agreement to cede the right in exchange for payment). B and C also conclude a transfer agreement, in that B forms the intention to cede and C to receive the right. The underlying agreement is voidable and may be set aside on the basis of fraud. The fraud will taint not only the obligatory agreement, however, but also the cession itself. If, therefore, C rescinds the contract of sale of the right, the cession will also be retroactively invalidated. If, in the mean time, C has received payment from the debtor A, such payment would clearly be *sine causa* and A could presumably claim repayment directly from C.

In certain circumstances where the relationship between B and C is based on mistake, the claim will also not be transferred to C.²⁷² For example, B owes C €100 000. B holds two valid claims against A: the first is a claim for €90 000 as the purchase price in terms of a contract of sale; the second is a claim for €95 000 in terms of a contract of loan. B wants to cede the first claim to C, in full and final settlement of his debt to C. C's intention, on the other hand, was to accept cession of the second claim in settlement of B's debt. A purported contract to cede 'the right against A' would be voidable on the basis of mistake in German law²⁷³ and, if it were rescinded, any transfer agreement (cession) would also fall away, and any payment by A to C could be reclaimed on the basis of the law of enrichment as in the above example.

This type of situation is not generally discussed by South African writers. It seems that B would be entitled to an enrichment action, in accordance with the common law and general principles of enrichment liability: C has been enriched (by the cession i.e. the acquisition of a right, or the increase in his assets), B has been impoverished (by the loss of a right), the enrichment has not taken place in terms of any contractual or other obligation (i.e. it is *sine causa*).²⁷⁴ Similarly, provided that B effected the cession due to an excusable error, the *condictio indebiti* would probably

²⁷² Cf the previous footnote.

²⁷³ § 119 BGB.

²⁷⁴ Cf Chapter One above.

would only be validly ceded to C. The second, purported cession would, in other words, be ineffective.²⁷⁸ If A performed to C, his performance would extinguish his obligation. All that D could do would be to sue B for breach of their obligatory agreement, assuming that they had concluded one and that it was valid and enforceable.²⁷⁹

The real problems arise where A performs to D. German law draws a distinction between cases where A performs to D knowing that the claim was first ceded to C and those where he (A) was unaware of the first cession when he made the performance to D. Where A acted in ignorance of the cession to C, §§ 407 (1)²⁸⁰ and 408 (1)²⁸¹ BGB, read together, allow A to raise his performance to D against C. In other words, C is prevented from suing A on the original claim and A thus cannot be forced to perform to C,²⁸² having already performed to D. This seems unfair to C: he cannot even sue B for breach of contract, because B has performed by ceding the claim to him. The BGB therefore grants C an enrichment action (in terms of § 816 (2) BGB)²⁸³ against D, the recipient of the performance that C was legitimately entitled to receive from A.²⁸⁴

On the other hand, if A was aware of the prior cession to C when he

²⁷⁸ Medicus *Schuldrecht II* marg note 707.

²⁷⁹ Cf the discussion concerning impossibility above.

²⁸⁰ § 407 BGB (see note 57 above for the text and a translation). For the South African equivalent of this rule (i.e. that performance to the cedent in ignorance of a cession will discharge the debtor's liability) see Christie *Contract* 542 and the references cited in note 57 above.

²⁸¹ § 408 (1) BGB: '[Mehrfache Abtretung] Wird eine abgetretene Forderung von dem bisherigen Gläubiger nochmals an einen Dritten abgetreten, so finden, wenn der Schuldner an den Dritten leistet oder wenn zwischen dem Schuldner und dem Dritten ein Rechtsgeschäft vorgenommen oder ein Rechtsstreit anhängig wird, zugunsten des Schuldners die Vorschriften des § 407 dem früheren Erwerber gegenüber entsprechende Anwendung.' ([Multiple assignment] (1) If the principal debt is reassigned by the assignor to a third party, and if the debtor effects the performance in favour of the third party, or if a legal transaction is entered into or an action is commenced between the debtor and such third party, the provisions of § 407 apply *mutatis mutandis* in favor of the debtor as against the former assignee.' (Transl Forrester *et al* (n 57).)

²⁸² Medicus *Schuldrecht II* marg note 707: '... by his performance to the non-entitled second cessionary, the debtor is freed vis-à-vis the entitled first cessionary'. (My translation.)

²⁸³ § 816 (2) BGB: 'Wird an einen Nichtberechtigten eine Leistung bewirkt, die dem Berechtigten gegenüber wirksam ist, so ist der Nichtberechtigte dem Berechtigten zur Herausgabe des Geleisteten verpflichtet.' ('If an act of performance is done for the benefit of a person not entitled thereto, which is effective against the person entitled, the former is bound to hand over to the latter the value of such performance.' (Transl Forrester *et al* (n 57).) For the context, see Appendix A.

²⁸⁴ This enrichment action is a special type of *Eingriffskondiktion*: see Medicus *Schuldrecht II* marg notes 698 ff, 707. Also cf *Münchener Kommentar/Lieb* § 816 marg notes 2, 6 ff.

performed to D, the legitimate cessionary, C, is allowed to sue A (in terms of the ceded claim). In other words, A is not allowed to raise the defence contained in §§ 407 and 408 BGB and would have to make the same performance to C as he has already made to D.²⁸⁵ He would, however, be entitled to sue D for unjustified enrichment; D has received the performance without a valid legal ground, as he has no claim against A due to the application of the priority principle. D would be able to sue B for breach of an underlying obligatory agreement provided that it were valid and enforceable.²⁸⁶

South African law

How would these problems be approached in terms of South African law? In terms of our law of cession, only the first cession would be valid: not only because *qui prior est tempore, potior est in iure*,²⁸⁷ but also because of the rule that *nemo plus iuris transferre potest quam ipse habet*.²⁸⁸ Once B has ceded his claim against A to C, he has nothing left to cede to D.²⁸⁹ D's only course of action would arguably be to sue B for breach of contract (i.e. breach of the obligatory agreement underlying the purported cession)²⁹⁰ or perhaps to bring a delictual action for fraud.²⁹¹

A performs to D with knowledge of B's prior cession to C

What would happen if A performed to D, and what role does A's knowledge of the prior cession play in South African law? The case of *Rane Finance (Pty) Ltd v*

²⁸⁵ See Palandt § 407 marg notes 6-7.

²⁸⁶ Cf the discussion of impossibility above.

²⁸⁷ Van der Merwe *et al Contract* 477. Cf earlier authorities which favoured notice to the debtor over the principle of priority: Van der Merwe *et al op cit* 434 ff and 478; Christie *Contract* 543; Kaser *Roman Private Law* 272 (regarding post-classical sources): the cessionary was 'secured ... by giving notice (*denuntiatio*) of the cession to the debtor'

²⁸⁸ For the same idea in German law, see Medicus *Schuldrecht I* marg note 740 and *idem Schuldrecht II* marg note 707. But cf the position regarding a cession *in securitatem debiti*, where the cedent is able to re-cede a right: see Van der Merwe *et al Contract* 463 ff and 479. For this reason, such cessions will not be discussed here.

²⁸⁹ If it was an out-and-out cession – if it was a cession *in securitatem debiti*, the ceded right may be ceded again, because the cedent in such cases remains the owner of the right: see, e.g., *Incedon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804; *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd supra*; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A).

²⁹⁰ But only if this is valid: cf the discussion above regarding the effect of impossibility of performance on the obligatory agreement.

²⁹¹ But cf Van der Merwe *et al Contract* at 478, where the authors state that '[t]he second cessionary was never entitled to receive performance from the debtor, but in the absence of a proprietary remedy any possible liability on his part towards the first cessionary rests on the uncertain basis of either delict or unjustified enrichment.'

*Queenstown Municipality and Another*²⁹² concerned a double cession where the debtor performed to the second cessionary (D) despite being aware of the prior cession to C.

In this case, Ultrasonic (B) and Rane Finance (C) concluded a contract, in terms of which Ultrasonic ceded all its book debts to Rane Finance, in exchange for a loan. Ultrasonic subsequently sold and delivered two consignments of equipment to the Queenstown Municipality (A). The Town Treasurer issued a cheque (dated 12 November 1979) for the first instalment of the purchase price, and it was collected by Ultrasonic.

The Treasurer then became aware of a letter from Rane Finance's attorneys, dated 5 November and probably received before 12 November,²⁹³ confirming that one of the Municipality's employees (a junior clerk named Pretorius) had been informed on 31 October that Ultrasonic had ceded all its book debts to Rane Finance. The letter requested payment of the full purchase price and said that 'any payment to Ultrasonic [would] ... not be regarded in law as a payment in discharge of [the Municipality's] ... obligations'.²⁹⁴ The Town Treasurer thereupon countermanded the cheque.

He was then informed by Untiedt, sole director and shareholder of Ultrasonic, that the claim against the Municipality had been ceded to Paddy's Investments (D) and that the cheque would be passed on to this cessionary. 'At some stage' the Town Treasurer received a copy of this cession. Forming the opinion that the date on which the cheque was drawn was the date of payment²⁹⁵ and that notice of the cession to Rane Finance was only received when he became aware of the attorneys' letter²⁹⁶ (i.e. that he had made the payment before receiving notice of the cession), the Town Treasurer cancelled the countermand. The cheque was apparently handed to Paddy's Investments, and the Municipality paid the second instalment directly to the second cessionary (D). It appears that Paddy's Investments were not aware of the

²⁹² *Supra.*

²⁹³ See the judgment at 197E.

²⁹⁴ See the judgment at 196A and 197H.

²⁹⁵ See 196C-D and 197E-F.

²⁹⁶ See 197E.

earlier cession, and that the payments were received *bona fide*.²⁹⁷ Some three months after the final payment had been made, Ultrasonic was placed in liquidation.

Rane Finance thereafter claimed payment of the whole purchase price from the Municipality (i.e. C sued A for satisfaction of the ceded claim). Paddy's Investments was drawn into the litigation by the Municipality, which claimed that if the Municipality were obliged to pay Rane Finance, it should be allowed to recover the payments (as having been made in error) from Paddy's Investments.²⁹⁸

The court was satisfied that the first payment took place when the cheque was cleared by the Municipality's bank,²⁹⁹ and that, at that time, the Town Treasurer was aware that the claim had been previously ceded to Rane Finance.³⁰⁰ The question that therefore arose for decision, according to the court, was 'whether a debtor, who has had notice of the cession of a debt to ... [C], and then makes payment to another cessionary ... [D], is, when he is called upon to pay ... [C], entitled to recover the earlier payment from ... [D]'.³⁰¹ The parties conceded that the relevant legal question was not whether the Municipality, as debtor, had to pay Rane Finance, as cessionary.³⁰²

The court held that a *condictio indebiti* would not be available to a party who acted grossly negligently or one who knew that the payment was not due.³⁰³ The court concluded that the Town Treasurer, an experienced administrator,³⁰⁴ had acted grossly negligently,³⁰⁵ and that his error, if error there was, was therefore not excusable. The Municipality was accordingly not entitled to recover the payments made to Paddy's Investments.

The judgment implies that, as in German law, C can sue A for performance. In principle, A can then bring a *condictio indebiti* against D. This would only

²⁹⁷ See 196G.

²⁹⁸ See 195C.

²⁹⁹ See 198F.

³⁰⁰ See 198G.

³⁰¹ See 198H-I.

³⁰² See 198H-I.

³⁰³ The court stated that 'even a doubt whether it is due or not would prevent its recovery': see 199C-D.

³⁰⁴ See, *inter alia*, 196I-J.

³⁰⁵ See 199H-I.

succeed, however, if A's error were excusable, and a payment made with the knowledge of the prior cession would not be excusable.³⁰⁶ In effect, therefore, where a debtor (A) pays a second cessionary (D), he cannot use the *condictio indebiti* to claim back the payment made to D if he was aware of the prior cession. In other words, in effect, C can sue A but – contrary to the German rule – A has no recourse against D. This would be unfair to A, as he would have to perform twice, and would unfairly advantage D. It seems, however, that A would be able to recover his performance from D by other means, for example the *condictio sine causa specialis* or the general enrichment action:³⁰⁷ in such circumstances D would arguably be enriched (as the performance would not have extinguished any liability owed to him), and this enrichment would have been *sine causa*.

A performs to D in ignorance of B's prior cession to C

Now let us consider what happens where A performs to D in ignorance of the prior cession to C.

Firstly, what is C's position, if A performs to D in such circumstances? Can C sue A for performance? Or does A's performance to D discharge his debt to C, as in German law? As said above, German law allows this by extending the rule that a debt is discharged where a debtor performs to a cedent in ignorance of the cession (contained in § 407 BGB) to situations where the debtor performs to a second cessionary in ignorance of the first cession. In other words, a performance A–D will discharge the liability A–C. The South African position is unclear.

Van der Merwe *et al*³⁰⁸ state that '[w]here the second cessionary gives notice of the cession to the debtor, who pays him in good faith, the debtor is presumably protected against further liability towards the prior cessionary as true creditor.' They do not cite any authority for this proposition, but say that '[a] categoric distinction between *bona fide* payment to a cedent and payment to a second cessionary seems problematic.'³⁰⁹ In other words, the authors suggest that we should, like the

³⁰⁶ Although such a case might now be approached differently, in the light of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A). In this regard, see Eiselen and Pienaar *Unjustified Enrichment* 119.

³⁰⁷ Cf *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) and Chapter One above.

³⁰⁸ *Contract* 478.

³⁰⁹ *Contract* 478n408.

Germans, extend the rule that protects a *bona fide* debtor who pays a cedent to a *bona fide* debtor who pays a second cessionary. They go on to say that 'any possible liability on his part towards the first cessionary rests on the uncertain bases of either delict or unjustified enrichment.'³¹⁰

The principle of priority, on the other hand, suggests that C can always sue A in terms of the claim that he validly received by B's first cession. As implied in the *Rane Finance* decision, A can then sue D for recovery of the performance, provided that the requirements of the relevant enrichment remedy (e.g. the *condictio indebiti*) are satisfied.³¹¹ This is contrary to the position in German law, which allows C an enrichment claim against D in such circumstances. The general principles of enrichment liability also suggest that, unlike German law, our law would not allow C an enrichment claim against D: while D has undoubtedly been enriched, one cannot say that C has been impoverished at his expense because he (C) still has his claim against A.

Were South African law to apply the priority principle without exception, C would have to proceed against A (in terms of original claim) and A against D (for enrichment e.g. with a *condictio indebiti* if he acted in error) and D against B (for breach). The difficulty with this is that it leaves C in rather an unfortunate position if A is unable to make the performance twice. It would also be unfair to A if he performed to D in the *bona fide* belief that he was obliged to do so; he would have to bear the legal costs of suing D (*condictio indebiti*), as well as having to make the same performance to C as he has already made to D. In most cases, A would therefore have to carry the cost of B's dishonesty or mistake. This is clearly inequitable, particularly since A has acted *bona fide*. It also has the disadvantage of being inefficient; whereas the case would be solved by a single direct action in German law, South African law would require at least two (C–A and A–D).³¹²

I therefore agree with Van der Merwe *et al* that our law should follow the example set by German law.

³¹⁰ Contract 478.

³¹¹ See *Rane Finance (Pty) Ltd v Queenstown Municipality and Another supra (obiter)*.

³¹² D would probably be unable to sue B for breach because their obligatory agreement could be void for impossibility. In any event, D is only likely to sue B for breach if he (D) is successfully sued by A, which is unlikely, unless A is a wealthy debtor.

CONCLUSION

Although our law reports are replete with cases concerning cession, it is remarkable how few deal with the problems of enrichment in that context. Similarly, academic writers have paid very little attention to this topic in South Africa.³¹³ It is therefore interesting to discover that this has been the subject of such heated debate in Germany.³¹⁴

The most contentious issue is the question of cession of a non-existent right. The view that A should sue B, who should in turn sue C, has won the support of the majority of writers as well as the courts. This view is an attractive one, as it is consistent with the general pattern of liability sketched in previous chapters. It also seems to achieve the best balance of the relative interests of the parties, particularly in the context of insurance contracts.

In the circumstances, it is not easy to reject this point of view in favour of the minority opinion that A should sue C directly. The view of the minority, however, seems to be correct, at least on rather technical grounds relating to the principle of abstraction. In terms of South African law, A's position is influenced by the nature of the defect in the relationship between A and B. If they are linked by a voidable contract, it appears that A has recourse against B in that he may claim *restitutio in integrum* and thus recover any performance made to B. If A has also made a performance to C in such circumstances, however, he may recover that performance directly from C via the law of enrichment. If the contract between A and B is void *ab initio*, A must similarly proceed against C. In other words, in a case of cession, A's performance is not imputed to B; it thus cannot extinguish B's liability to C in the same way that A's performance to C would extinguish the debt B–C in the case of an *Anweisung*. The only situation in which A's performance could discharge B's liability to C would be where C accepts it in fulfilment of B's debt, i.e. as a 'conditional performance'³¹⁵ (analogous to the German *Leistung an Erfüllungs*

³¹³ Eiselen and Pienaar *Unjustified Enrichment*, for example, only mention one of the (few) cases discussed in this chapter.

³¹⁴ This may perhaps, in part, be attributed to the more open-ended, normative, approach of the German law of enrichment. Examples of rules that make German law relatively flexible include the requirement that the defendant in an enrichment claim merely 'receive something', and the absence of a requirement of impoverishment.

³¹⁵ See note 211 above.

Statt).³¹⁶

The second situation considered in this chapter is that where A owes a debt to B, B agrees to cede it to C, but the cession does not validly take place. The prevailing opinion in Germany is that A should sue C.

In the next situation, the contractual relationships and the cession are all valid, but A makes a performance to C that exceeds what was required. The majority view is that A should sue C in such circumstances. Canaris, on the other hand, draws a distinction between cases where the problem lay in the relationship between A and B, and those where there was a problem in the relationship between A and C. In the first case, he says, A should sue B; in the second, A should sue C directly.

Then the following situation was considered: the claim B–A is valid, and B validly ceded the claim to C, but the obligatory agreement between B and C was defective. In such circumstances, the only enrichment claim would be brought by B against C.

Finally, the case of multiple cessions was considered. German law distinguishes between situations where A performs to the second cessionary, D, aware of B's prior cession to C, and those where A was ignorant thereof. In the first case, German law allows the first cessionary (C) to enforce his claim against the debtor. The debtor, on the other hand, is entitled to bring an enrichment claim against D. South African law also permits C to enforce his claim against A, but – unlike German law – does not allow A to bring a *condictio indebiti* against D. The general principles of enrichment liability lead to a more equitable result as they would allow A recourse against D. If the debtor was ignorant of the prior cession to C, C is barred from suing A, but he can sue D for unjustified enrichment. South African law should follow this approach.

³¹⁶

See Chapter One at p 37 above. It would not constitute unconditional performance by a third party, as dealt with in Chapter Two, because the obligatory agreement between B and C stipulates that B owes a particular performance to C, namely cession of the right against A. Only cession of that right will discharge B's liability to C.

CHAPTER FIVE

CONCLUSION

The introductory chapter of this thesis ended with an example: A performs to B, who then makes the same performance to C. The law of unjustified enrichment is applicable where one or both of the underlying contracts¹ are invalid. This case of consecutive performances – a so-called enrichment chain – constitutes the most basic of multi-party enrichment situations. It was explained that, according to the German law of unjustified enrichment, the parties to an enrichment action are generally the parties to the defective relationship in question. A can only sue B; B can only sue C. The same pattern is followed where both underlying contracts are invalid. C can thus generally only be sued by B in such circumstances. B may in turn be sued by A, whose claim would be for the value of B's claim against C. (This has superseded the view that A could claim cession of B's claim against C: a *Kondiktion der Kondiktion*.) There is an exception to this pattern of liability, where the ultimate receipt was gratuitous. In such a situation, A may sue C directly. It was shown that there is support in South African law for the idea that enrichment claims should follow the links of the chain: A should sue B; B should sue C. The question posed at the end of Chapter One was therefore whether German and South African law follow this pattern (A–B–C) in circumstances involving not consecutive performances, but a performance directly from A to C: situations that the Germans call 'triangular'.

In the following chapters, three such triangular situations were discussed. In each of them, a party (A) either hands something to or does something for another (C). The three situations are distinguished by the factor, if any, that prompted A to make that

¹ Or other legal grounds.

‘performance’ to C. In Chapter Two, A acts *sua sponte*, without being instructed or obliged to make that performance. In Chapter Three, A ‘performs’ to C because he has been instructed to do so by B. In Chapter Four, A makes the performance to C as B has ceded a claim against him to C.

Chapter Two dealt with situations where A performs in terms of B’s debt to C without any prompting from B or anyone else. It was shown that both German and South African law regard A’s fulfilment of B’s obligation as amounting to the ‘administration of the affairs of another’. Provided that certain requirements are met, such administration will give rise to a quasi-contractual relationship between A and B, which provides a *causa* for A’s performance. In terms of this relationship (*negotiorum gestio* or *Geschäftsführung ohne Auftrag*), A is entitled to claim reimbursement from B. Should all of the requirements for *negotiorum gestio* not be met, on the other hand, B will have been enriched *sine causa* and A will only be able to recover any amount by which B is enriched.

Both German and South African law only allow A an enrichment claim against B in certain discrete sets of circumstances. These fall under the headings of *quasi negotiorum gestio* in South Africa, and either *unechte* or *unberechtigte Geschäftsführung ohne Auftrag* in Germany.

It was shown that both systems thus allow A to sue B for unjustified enrichment where A did not act with the *animus negotia aliena gerendi* (or *Fremdgeschäftsführungswille*). Firstly, A could have intended to benefit himself by performing in terms of B’s obligation to C: in such a situation, A would be called a *mala fide gestor* in South Africa, and the situation would be called *Geschäftsanmaßung* (one of the two forms of *unechte Geschäftsführung ohne Auftrag*) in Germany. Each system allows A to sue B for unjustified enrichment, but limits A’s enrichment claim in some way in order to protect B’s interests. In South African law, A may thus only sue B if B’s enrichment was ‘improper or unjustified’. In German law, on the other hand, A may only sue B for enrichment once B has exercised all his rights against A. It was

suggested that South African law needs to pay more attention to B's position, and to spell out any remedies to which he should be entitled. It was argued that the additional requirement that B's enrichment was 'improper or unjustified' serves a useful purpose in protecting B's interests and that it could be regarded as an expression of the requirement that the administration be *utiliter*. In other words, when a case falls into the domain of *quasi negotiorum gestio* rather than *negotiorum gestio* proper, this does not mean that all of the requirements of *negotiorum gestio* should be disregarded.

In theory, both systems also allow an enrichment claim to someone who administers the affairs of another in the belief that he is administering his own affairs (*bona fide gestio* or *irrtümliche Eigengeschäftsführung*). Whether such a situation could arise within the factual paradigm of Chapter Two depends whether it is possible for A to extinguish B's obligation to C, thinking that he is administering his own affairs.

According to German law, A can sue B for enrichment where A's administration of B's affairs was against his express or implied wishes, or not in B's interest (*unberechtigte Geschäftsführung ohne Auftrag*). The other requirements of *Geschäftsführung ohne Auftrag* must be satisfied for A to succeed in suing B for unjustified enrichment in such a case. B is protected by rules borrowed from the law of cession. (This is justified on the grounds that B's position is similar to that of a debtor in a case of cession, who also suffers a change of creditors without his consent.) In South African law, on the other hand, A can sue B for enrichment if he administers B's affairs against B's express wishes (*domino prohibente*), but not if his administration is against B's implied wishes, or against his interests. It was suggested that this situation is anomalous. It was thus argued that, assuming that prevention of unjustified enrichment is sufficient ground to allow an action to a *gestor* who acts against the express wishes of the *dominus*, a *gestor* who acts against his implied wishes or against his interests should also be allowed an enrichment claim against B. It was agreed that B should be afforded protection in such circumstances. South African law provides some protection to B by stating that A must prove 'circumstances that made it just' for him to intervene. This test has been the subject of criticism. In this thesis, I suggest that a better means of

protecting B's interests would be to follow the German example and develop rules analogous to those in our law of cession. If B is sued for enrichment, he should thus be allowed to raise any defences and set off any claim that he would have had against his original creditor (C).

Finally, the situation of minors was considered. If someone administers the affairs of a minor, South African law only allows him to sue the minor on the basis of unjustified enrichment. Comparison with German law, together with an analysis of the relative interests of the parties and the relevant policy considerations, led to the conclusion that this aspect of our law is unsatisfactory: the *gestor* should be allowed to claim all his expenses in such circumstances.

The general formulation of the requirements for the extended *actio negotiorum gestorum*, and the fact that it can be used to reclaim the value of a *factum*, have made this remedy an attractive alternative to a general enrichment action. It was noted in Chapter Two, however, that German law retains these specific instances of enrichment liability notwithstanding the general enrichment action contained in § 812 BGB. This suggests that the law already developed in this field should not be abandoned when our courts recognise a general enrichment action. It was thus suggested that the extra requirements posed by the courts in this context (for example, those concerning the *mala fide gestor* and the *gestor* who acts *domino prohibente*) should be retained, but that they should be given a more precise and definite content.

The next hypothetical situation discussed in Chapter Two was the case where A purports to perform in terms of B's obligation to C but such performance does not extinguish B's liability. In such circumstances, both German and South African law allow A to sue C directly on the basis of unjustified enrichment. Similarly, A may bring an enrichment action directly against C, in both legal systems, if A purports to perform in terms of B's obligation to C, where B in fact owes nothing to C. The latter case has caused controversy in Germany, and it exemplifies some of the shortcomings of the German *Leistungsbegriff*. It was thus explained why the currently prevailing opinion in

Germany is that cases of multi-party enrichment should not be approached in a mechanical way, but that they should be analysed from the perspective of the interests of the parties, with a view to a fair allocation of risk. Such an interests-analysis suggests that A should be able to bring an enrichment claim directly against C. The fact that a South African court would not have any difficulty in coming to this conclusion on the basis of either our traditional remedies or the general principles of enrichment liability illustrates our courts' relative readiness to allow A a direct action against C.

To sum up, then, A can sue B if the requirements of *negotiorum gestio* or *quasi negotiorum gestio* are satisfied. In the case of *negotiorum gestio* proper, A's claim is for all of his expenses. In the case of *quasi negotiorum gestio*, A's claim is limited to the amount of B's enrichment. If A's performance does not discharge any obligation owed by B to C, on the other hand, A may sue C directly. In other words, B is only drawn into the picture by the extinction of his liability to C.

Chapter Three concerned cases where A was prompted to perform to C because he was instructed to do so by B. The German law concerning B's instructions to a debtor or a third party to make a performance owed by B to C (*Anweisungen*) was discussed. It was shown that this concept has its roots in the *delegatio solvendi* of Roman law, and that certain South African cases seem to support the existence of such a concept in our modern law. It was argued that this notion should be overtly recognised as part of our law, as it provides a useful means of explaining certain aspects of banking law and the extinction of obligations generally.

Against this background, various factual situations that could arise in the context of cheque payments were examined. The first situation discussed was the one where there was a defect in the relationship between A and B. In other words, there was a valid relationship between B and C, and A performed to C. Three possibilities were considered: the situation where B instructed A to perform in the absence of a valid underlying legal relationship between A and B; the situation where A and B were linked by an underlying legal relationship and B instructed A to perform, but then revoked that

instruction; and the situation where A and B were linked by a valid underlying relationship but B did not validly instruct A to perform to C.

Regarding the first hypothetical situation (namely, where there was no underlying legal relationship between A and B), it was shown that the prevailing opinion in Germany holds that A can bring an enrichment claim against B in such circumstances. A's claim would be for the value of B's enrichment claim against C. This point of view is supported by an analysis of the relative interests of the parties, and the application of Canaris's principles. Although there are no reported South African decisions dealing with similar facts in the context of cheque payments, there is authority for the proposition that A could sue B in analogous circumstances (i.e. where A was an insurer who made a payment in accordance with an instruction by its supposed client, B). It was argued that the case in question (*Licences and General Insurance Co v Ismay*)² is important because the judge effectively held that a performance made by A to C constituted a *datio* by A to B. A was thus able to bring a *condictio indebiti* against B.

Regarding cases where A performs to C notwithstanding the fact that B has revoked his instruction (e.g. countermanded a cheque), German law distinguishes between situations where C was aware of the revocation, and those where C was unaware thereof. It was suggested that this distinction is a useful one, as it draws attention to the question of C's reliance on the validity of the performance made to him.

It was shown that South African law and German law agree that A can bring an enrichment action directly against C in situations where C was aware that B had revoked his instruction. Our courts, like the majority of writers and the courts in Germany, arrive at this conclusion via an analysis of the relative interests of the parties and the allocation of risk. For example, C's reliance is not considered to be worthy of protection as he knew that B had revoked his instruction. It is agreed that A's performance to C should not be attributed to B in such circumstances.

² 1951 (2) SA 456 (EDL).

Both German law and South African law allow A an enrichment claim against B (rather than C) in situations where C was unaware that B had revoked his instruction. In Germany, this point of view is supported by analysing the interests of the parties. The current approach of the South African courts also suggests that A should bring an enrichment claim against B. In effect our law says that B is enriched by the extinction of his obligation to C: A's performance to C is attributed to B and thus discharges the liability B–C. The situation is thus distinguished from the case of performance by a third party dealt with in Chapter Two. It was argued that extinction of liability in such cases can best be explained by the notion of *delegatio solvendi* which, like the German *Anweisung*, regards A's performance to C under B's instruction as two *dationes*: A to B, and B to C. It was also suggested that the most appropriate of the traditional remedies would be the *condictio indebiti*, notwithstanding the court's stated preference for the extended *actio negotiorum gestorum contraria*.

If A performs to C where A has not received any valid instruction to make such performance, A is allowed to sue C directly, according to the *herrschende Meinung* in Germany. Again, this conclusion is based upon an analysis of the interests of the parties. In such circumstances, it is agreed that B, who did not instruct A to make this performance, should be left out of the picture. C will thus be liable whether or not he was aware of the absence of a valid instruction, and whether or not he was owed anything by B. It was shown that South African courts seem to regard it as obvious that A should not have an enrichment claim against B in such a situation. An analysis of the relative interests of the parties leads to the conclusion that A should sue C in circumstances where A was not validly instructed by B to perform to C. It was argued that A's performance to C should not be attributed to B, in the absence of a valid instruction B–A, and should therefore not discharge any debt owed by B to C in such circumstances. This point of view is supported by policy considerations. C would thus be the party who was enriched by A's performance. Or, to use the traditional terminology, A would be the *recipiens* of A's performance. As in German law, C's interests are sufficiently protected by the defence of loss of enrichment. In this context, it was also argued that the only relevant *causa* that could defeat A's claim in such a

situation would have to lie between A and C.

The next situation discussed in Chapter Three was the controversial case of *Doppelmangel*, namely a situation where the contracts between A and B, and B and C, are defective. The prevailing opinion in Germany is that A should sue B, and B should sue C in such circumstances. In other words, A will generally not be allowed to sue C directly. Technically, A must sue B for the value of his claim against C (the *Kondiktion der Kondiktion* having been rejected by the writers, if not by the courts). This conclusion is again supported by an analysis of the interests of the parties. It is agreed, however, that A can sue C directly in exceptional circumstances. For example, a direct claim will be allowed where C received the performance gratuitously. Applying the general principles of South African law leads to the conclusion that A should sue C directly, notwithstanding the fact that comparing the interests of the parties leads to the conclusion that suits should be directed 'around the triangle' (i.e. A–B–C). It was shown that the traditional requirements of the *condictio indebiti* may be interpreted in such a way as to allow A to sue B. It was conceded, however, that a South African court faced with such a matter would be more likely to allow A to sue C directly.

The final hypothetical situation dealt with in Chapter Three concerns a performance by A to C where there was no defect in the relationship between A and B, but the relationship between B and C was defective. In such circumstances, it seems that both German and South African law would allow B an enrichment claim against C.

In Chapter Four, I discussed cases where A performs to C (rather than to B) because of a cession by B to C. The discussion began with the most controversial of factual situations viz those where B purports to cede a non-existent claim against A to C, and A performs to C as a consequence. According to German law, the cession would be ineffective, although the underlying obligatory contract between B and C could be valid. The majority view in German law is that enrichment claims in such a situation (and in situations of *Doppelmangel*) should be directed 'via the triangle': A should sue B, and B should sue C. There is, however, a strong minority opinion that A should be

able to sue C directly in such circumstances. It was suggested, on technical grounds, that the minority opinion may be the more correct, even though Canaris's interests-based analysis militates against such a result.

It was shown that South African law does not generally allow a situation where B can conclude a valid obligatory agreement to cede a non-existent claim; such an agreement would be void for impossibility. Most cases of cession of a non-existent claim would thus amount to situations of *Doppelmangel*. The few South African cases on the topic suggest that A can bring an enrichment claim directly against C (as would happen in cases of *Doppelmangel* in the *Anweisung* cases). The relevant cases approached the matter from the perspective of the traditional remedies. The most apposite case³ held that A was the *solvens* and C the *recipiens*. Although our courts have been prepared to interpret the *datio*-requirement in a less literal way in other contexts, it does not seem that the court would yet regard a supposed contractual claim between A and B as sufficient reason to regard B as the *recipiens*. It appears that the court would come to the same conclusion (that the only possible enrichment claim would be one between A and C) if it applied the general principles of enrichment liability. This is mainly due to the requirement that the defendant be enriched: C was clearly enriched in such circumstances and, according to existing principles, B does not appear to have been enriched in any way.⁴ As in cases of *Doppelmangel* in Chapter Three, our enrichment-requirement prevents the direction of claims 'via the triangle', even though such an approach might be preferable from a policy perspective that takes into account the interests of the parties. The only circumstances in which A would have recourse against B would be where the claim B–A was voidable, and the recourse would take the form of rescission and *restitutio in integrum*.

Then the following situation was considered: A performs to C in circumstances where B had a valid claim against A, and B concluded a valid obligatory agreement

³ *Koen v Goosen* 1971 (3) SA 510 (C).

⁴ Bearing in mind the court's rejection of arguments analogous to the German *Kondition der Kondition* in the case of *The Standard Bank of South Africa Ltd v Haskins* Case No 4688/90 11 April 1991, unreported.

to cede this claim to C, but the cession was invalid. It appears that German writers agree that A should be able to sue C directly in such circumstances. Although there are no South African cases that deal with such a matter, it appears that our courts would come to the same conclusion. A South African court would probably also decide that A should sue C, as most German lawyers agree, where all the relationships were valid but A's performance to C exceeded what was owed.⁵

It appears that South African and German law would agree that B should sue C where B has a valid claim against A, and validly cedes this to C, in a situation where the underlying obligatory contract between B and C is defective.

Finally, the situation of 'double cession' was considered. It was explained that German law draws a distinction between cases where the debtor performs to the second cessionary, D, knowing that B had previously ceded the claim to C, and those where A was unaware of B's prior cession. In the first case, German law allows the first cessionary (C) to enforce his (contractual) claim against the debtor who would, in turn, be able to sue the ultimate recipient (D) on the basis of unjustified enrichment. South African law similarly allows C to proceed against A for satisfaction of the ceded claim, but it appears that A would not be entitled to bring a *condictio indebiti* against D. It was suggested that applying the general principles of enrichment liability would lead to a fairer result as they would allow A recourse against D.

In the second situation (i.e. where the debtor was unaware of the prior cession), on the other hand, German law says that C cannot sue A in terms of the ceded claim, but C can bring an enrichment claim against D. It was argued that South African law should follow this example.

Bearing in mind the view repeatedly expressed in Germany that triangular cases of multi-party enrichment do not allow any 'schematic solution',⁶ what general points

⁵ But cf. the discussion of the distinction drawn by Canaris: see Chapter Four above.

⁶ See, e.g., BGHZ 105, 365 at 369; BGHZ 50, 227 at 229; BGHZ 58, 184 at 187; BGHZ 61, 289 at 292; BGHZ 72, 246 at 250; BGHZ 87, 393 at 396; BGHZ 88, 232 at 235; BGH WM 1984, 423;

may be deduced from the above?

German law generally prefers claims 'via the triangle', following the pattern typical of enrichment chains. A direct claim (A–C) is allowed in exceptional circumstances, such as where C's receipt was gratuitous.⁷ In all of these exceptional cases, the majority opinion is that, taking into account the interests of the parties and the fair distribution of risk, C is less worthy of protection than B.

The pattern of liability is remarkably similar in South African law. Our law not only arrives at similar results to German law, but there are also similarities in approach. For example, it seems that our courts are now prepared to make a decision based on an analysis of the relative interests of the parties, taking into account relevant policy factors.⁸

There are basic differences in emphasis, however. Thus, South African law seems to start from the assumption that A can sue C directly, and special circumstances are necessary for A to sue B. It appears, however, that the range of circumstances in which A can sue B appears to be widening. For example, in the domain of our traditional remedies, it is stated that a *condictio indebiti* can only be brought by a *solvens* against the *recipiens*, but our courts do not interpret this requirement in a literal fashion. Thus it has been held in several cases that when A transfers ownership to C, he is legally making a *datio* to B: A is the *solvens* and B is the *recipiens*.⁹

BGHZ 122, 46 at 53.

⁷ Other exceptions allowed according to the prevailing opinion are the following: where there is no actual or purported legal link between A and B and A purports to perform in terms of B's obligation to C but does not succeed in extinguishing B's debt or B in fact owes C nothing (see Chapter Two); where B instructs his contract partner, A, to perform in terms of B's obligation to C but subsequently revokes that instruction, A may recover his performance from C only if C was aware of the revocation. Where A performs to C where A had not received any valid instruction to make that performance, A may sue C directly, whether or not C was aware of the lack of a valid instruction. (For these situations, see Chapter Three.) Similarly A may sue sue where B, who had a valid claim against A, concluded a valid obligatory agreement to cede this claim to C, but the purported cession was invalid and where all the relationships were valid but A's performance to C exceeded what was owed. (See Chapter Four.)

⁸ See, most notably, *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A).

⁹ See, for example, *Ismay's case supra*; *Phillips v Hughes*, *Hughes v Maphumulo* 1979 (1) SA 225 (N); *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A).

Applying the general principles of enrichment liability also leads to the conclusion that A can sue B in certain circumstances, notwithstanding the fact that A 'performed' directly to C. This conclusion is arrived at by the application of the requirement that the defendant be enriched. Bearing in mind that the three sets of situations covered by this thesis all deal with performance in terms of obligations (i.e. performances *solvendi causa*),¹⁰ B is regarded as the enriched party if A's handing over to C extinguishes an obligation owed by B to C. The question of enrichment liability (and the identification of the parties to an enrichment action) thus depends on the law concerning extinction of obligations. Some of the policies underlying discharge of obligations are the same as those which inform the decision as to whether someone should be liable for enrichment. There is also overlap between extinction of obligations and the requirement that enrichment be unjustified: if an obligation is extinguished, the performance will have been received *cum causa*; if no obligation was extinguished the receipt will be *sine causa*.

The German treatment of triangular cases of enrichment has also undergone various shifts. The requirement of 'directness' was discarded in favour of the *Leistungsbegriff*. The *herrschende Meinung* rejected this concept and now espouses the view that cases should be decided on the basis of an analysis of the interests of the parties. Very often, such an analysis leads to the conclusion that enrichment claims should lie between the parties to the relevant *Kausalverhältnis* ('causal relationship'), namely the relationship that would have provided a *causa* for the shift of assets in question had it been free of defects. The majority of German lawyers agree, however, that cases should not be resolved using a mechanical approach. Thus, if an examination of the relative interests of the parties and the allocation of risk leads to the conclusion that A should sue C directly, such a direct action will be allowed.

¹⁰ Chapter Two dealt with performance by a third party in his own right; Chapter Three dealt with performance under instruction (which would be regarded as the performance of the instructing party himself); Chapter Three could be said to have dealt with *Leistungen erfüllungshalber* and *Leistungen an Erfüllungs Statt* (provisional and alternative performances) by a third party: see p 354 in Chapter Four.

Our law has also apparently rejected the first means of keeping multi-party enrichment within bounds (namely, the requirement of ‘directness’):¹¹ thus a transfer of ownership from A to C may be regarded as a *datio* between A and B; the *recipiens* need not have received ownership directly from the *solvens*. This expansion of the notion of a *datio* raises the question whether our law has thus created a parallel to the German *Leistungsbegriff*.

As explained in Chapter One, German law regards a *Leistung* as a ‘conscious and purpose-directed increase of the assets of another’ (‘bewußte und zweckgerichtete Mehrung fremden Vermögens’).¹² A *Leistung* may accordingly lie between A and B, even if A handed something directly to C. The direction of the *Leistung*, and therefore the *Leistungskondition*, is determined by the purpose of the performing party. This purpose is determined objectively. The recipient’s subjective point of view is only taken into account where he was aware of the actual purpose of the performing party. In other words, the *Leistungsbegriff* is a largely unilateral criterion.¹³ The direction of a *datio*, on the other hand, is determined *inter alia*¹⁴ by reference to the legal relationships between the parties. For example, A’s ‘performance’ to C will be regarded as a *datio* to B, if there is some sort of relationship between A and B which would justify such a conclusion.¹⁵ In other words, the *datio* differs from the *Leistungsbegriff* in that its direction is not determined solely by the performing party’s (actual or supposed) purpose.

It also appears that our courts take policy considerations into account in determining whether the *datio* should be regarded as having taken place between parties other than those who factually gave and received the performance. Thus our approach includes aspects of the approach now followed by the *herrschende Meinung* in

¹¹ See, e.g., De Vos *Verrykingsaanspreeklikheid* p 89 ff.

¹² See, e.g., BGHZ 58, 184; BGH NJW 1999, 1393; Esser, *Schuldrecht* (2ed, 1960) § 189 Nr 6, 7; Lorenz (1991) 191 *AcP* 279 at 280; Medicus *Bürgerliches Recht* marg note 666; *idem Schuldrecht II* marg note 634; Stolte 1990 JZ 220 at 221. Also see Chapter One at p 38 above.

¹³ The advantage of this is that it takes into account the fact that someone may make a performance without intending to extinguish an obligation.

¹⁴ Thus the court also takes into account the intention of the performing party, the expectations of the recipient, and so on.

¹⁵ Such as agency or a fiduciary relationship: see *Bowman’s case supra*.

Germany. It is not yet clear what sort of relationship must link A and B in order for a *datio* to be attributed to another. In Chapter Three, it was argued that that a *delegatio solvendi* would provide a sufficient link. Judgments concerning cession of non-existent debts suggest, on the other hand, that our law might not yet be prepared to regard just any defective contract between A and B as providing a sufficient link to allow the attribution of A's performance to another. It was suggested that the *negotium* of our common law could provide a useful (bilateral) 'umbrella concept', analogous to the German *Kausalverhältnis*. Such a criterion would have the advantage of flexibility: in each case the court would have to take into account the relevant policy factors and the relative interests of the parties. At the same time, it would provide a general norm which could be used as a starting point for the solution of practical problems and for the development of further norms.¹⁶

¹⁶ Another advantage is that it would help to prevent confusion regarding counter-performances.

APPENDIX A

TEXT AND ENGLISH TRANSLATION OF THE TWENTY-FOURTH TITLE (§ 812-22) OF THE OF THE GERMAN CIVIL CODE

§ 812. [Grundsatz]

- (1) Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt.
- (2) Als Leistung gilt auch die durch Vertrag erfolgte Anerkennung des Bestehens oder des Nichtbestehens eines Schuldverhältnisses.

§ 813. [Erfüllung trotz Einrede]

- (1) Das zum Zwecke der Erfüllung einer Verbindlichkeit Geleistete kann auch dann zurückgefordert werden, wenn dem Anspruch eine Einrede entgegenstand, durch welche die Geltendmachung des Anspruchs dauernd ausgeschlossen wurde. Die Vorschrift des § 222 Abs 2 bleibt unberührt.
- (2) Wird eine betagte Verbindlichkeit vorzeitig erfüllt, so ist die Rückforderung ausgeschlossen; die Erstattung von Zwischenzinsen kann nicht verlangt werden.

§ 814. [Kenntnis der Nichtschuld; Anstands- und Sittenpflicht]

Das zum Zwecke der Erfüllung einer Verbindlichkeit Geleistete kann nicht zurückgefordert werden, wenn der Leistende gewußt hat, daß er zur Leistung nicht verpflichtet war, oder wenn die Leistung einer sittlichen Pflicht oder einer auf den Anstand zu nehmenden Rücksicht entsprach.

§ 815. [Nichteintritt des Erfolges]

Die Rückforderung wegen Nichteintritts des mit einer Leistung bezweckten Erfolges ist ausgeschlossen, wenn der Eintritt des Erfolges von Anfang an unmöglich war und der Leistende dies gewußt hat oder wenn der Leistende den Eintritt des Erfolges wider Treu und Glauben verhindert hat.

§ 816. [Verfügung eines Nichtberechtigten]

- (1) Trifft ein Nichtberechtigter über einen Gegenstand eine Verfügung, die dem Berechtigten gegenüber wirksam ist, so ist er dem Berechtigten zur Herausgabe des durch die Verfügung Erlangten verpflichtet. Erfolgt die Verfügung unentgeltlich, so trifft die gleiche Verpflichtung denjenigen, welcher auf Grund der Verfügung unmittelbar einen rechtlichen Vorteil erlangt.
- (2) Wird an einen Nichtberechtigten eine Leistung bewirkt, die dem Berechtigten gegenüber wirksam ist, so ist der Nichtberechtigte dem Berechtigten zur Herausgabe des Geleisteten verpflichtet.

§ 817. [Verstoß gegen Gesetz oder gute Sitten]

War der Zweck einer Leistung in der Art bestimmt, daß der Empfänger durch die Annahme gegen ein gesetzliches Verbot oder gegen die guten Sitten verstoßen hat, so ist der Empfänger zur Herausgabe verpflichtet. Die Rückforderung ist ausgeschlossen, wenn dem Leistenden gleichfalls ein solcher Verstoß zur Last fällt, es sei denn, daß die Leistung in der Eingehung einer Verbindlichkeit bestand; das zur Erfüllung einer solchen Verbindlichkeit Geleistete kann nicht zurückgefordert werden.

§ 818. [Umfang des Bereicherungsanspruchs]

- (1) Die Verpflichtung zur Herausgabe erstreckt sich auf die gezogenen Nutzungen sowie auf dasjenige, was der Empfänger auf Grund eines erlangten Rechtes oder als Ersatz für die Zerstörung, Beschädigung oder Entziehung des erlangten Gegenstandes erwirbt.
- (2) Ist die Herausgabe wegen der Beschaffenheit des Erlangten nicht möglich oder ist der Empfänger aus einem anderen Grunde zur Herausgabe außerstande, so hat er den Wert zu ersetzen.
- (3) Die Verpflichtung zur Herausgabe oder zum Ersatze des Wertes ist ausgeschlossen, soweit der Empfänger nicht mehr bereichert ist.
- (4) Von dem Eintritte der Rechtshängigkeit an haftet der Empfänger nach den allgemeinen Vorschriften.

§ 819. [Verschärfte Haftung bei Bösgläubigkeit und bei Gesetzes- oder Sittenverstoß]

- (1) Kennt der Empfänger den Mangel des rechtlichen Grundes bei dem Empfang oder erfährt er ihn später, so ist er von dem Empfang oder der Erlangung der Kenntnis an zur Herausgabe verpflichtet, wie wenn der Anspruch auf Herausgabe zu dieser Zeit rechtshängig geworden wäre.
- (2) Verstößt der Empfänger durch die Annahme der Leistung gegen ein gesetzliches Verbot oder gegen die guten Sitten, so ist er von dem Empfange der Leistung an in der gleichen Weise verpflichtet.

§ 820. [Verschärfte Haftung bei ungewissem Erfolgseintritt]

- (1) War mit der Leistung ein Erfolg bezweckt, dessen Eintritt nach dem Inhalte des Rechtsgeschäfts als ungewiß angesehen wurde, so ist der Empfänger, falls der Erfolg nicht eintritt, zur Herausgabe so verpflichtet, wie wenn der Anspruch auf Herausgabe zur Zeit des Empfanges rechtshängig geworden wäre. Das gleiche gilt, wenn die Leistung aus einem Rechtsgrunde, dessen Wegfall nach dem Inhalte des Rechtsgeschäfts als möglich angesehen wurde, erfolgt ist und der Rechtsgrund wegfällt.
- (2) Zinsen hat der Empfänger erst von dem Zeitpunkt an zu entrichten, in welchem er erfährt, daß der Erfolg nicht eingetreten oder daß der Rechtsgrund weggefallen ist; zur Herausgabe von Nutzungen ist er insoweit nicht verpflichtet, als er zu dieser Zeit nicht mehr bereichert ist.

§ 821. [Einrede der Bereicherung]

Wer ohne rechtlichen Grund eine Verbindlichkeit eingeht, kann die Erfüllung auch dann verweigern, wenn der Anspruch auf Befreiung von der Verbindlichkeit verjährt ist.

§ 822. [Herausgabepflicht Dritter]

Wendet der Empfänger das Erlangte unentgeltlich einem Dritten zu, so ist, soweit infolgedessen die Verpflichtung des Empfängers zur Herausgabe der Bereicherung ausgeschlossen ist, der Dritte zur Herausgabe verpflichtet, wie wenn er die Zuwendung von dem Gläubiger ohne rechtlichen Grund erhalten hätte.

TRANSLATION TAKEN FROM FORRESTER, GOREN AND ILGEN *THE GERMAN CIVIL CODE*

‘§ 812. [Principle]

(1) A person who, through an act performed by another, or in any other manner, acquires something at the expense of the latter without any legal ground, is bound to return it to him. This obligation subsists even if the legal ground subsequently disappears or the result intended to be produced by an act to be performed pursuant to the legal transaction is not produced.

(2) Recognition of the existence or non-existence of a debt, if made under a contract, is also deemed to be an act of performance.

§ 813. [Fulfilment despite defense]

(1) What was done with the object of fulfilling an obligation may be demanded back even if there was a defense to the claim whereby the enforcement of the claim was permanently barred. The provision of 222 (2) remains unaffected.

(2) If an obligation due on a certain date is fulfilled in advance, the right to demand return is barred; the discounting of interim interest may not be demanded.

§ 814. [Knowledge of debt not owed; moral duty and duty of common decency]

What was done with the object of fulfilling an obligation may not be demanded back if the person performing knew that he was not bound to effect the performance, or if the performance was in compliance with a moral duty, or for the sake of common decency.

§ 815. [Non-occurrence of result]

The right to demand return on the grounds of the non-occurrence of the result intended to be produced by what was done, is barred, if the production of the result was impossible from the beginning, and the person performing knew this, or if he has prevented the occurrence of the result in bad faith.

§ 816. [Disposition by person without title]

(1) If a person without title to an object makes a disposition of it which is binding upon the person having title he is bound to hand over to the latter what he has obtained by the disposition. If the disposition is made gratuitously the same obligation is imposed upon the person who acquires a legal advantage directly through the disposition.

(2) If an act of performance is done for the benefit of a person not entitled thereto, which is effective against the person entitled, the former is bound to hand over to the latter the value of such performance.

§ 817. [Violation of law or public policy]

If the purpose of an act of performance was specified in such a manner that its acceptance by the recipient constitutes an infringement of a statutory prohibition or is contrary to public policy, the recipient is bound to make restitution. The claim for return is barred if the person performing has committed a similar infringement, unless the performance consisted in entering into an obligation; what has been given for the performance of such an obligation may not be demanded back.

§ 818. [Extent of claim of enrichment]

(1) The obligation to return extends to emoluments derived, and to whatever the recipient acquires either by virtue of a right obtained by him, or as a compensation for the destruction, damage or deprivation of the object obtained.

(2) If the return is impossible on account of the nature of the object obtained, or if the recipient for any other reason is not in a position to make the return, he shall make good the value.

(3) The obligation to return or to make good the value is excluded where the recipient is no longer enriched.

(4) After the date an action is pending the recipient is liable under the general provisions.

§ 819. [Increased liability in case of bad faith and infringement of law or public policy]

(1) If the recipient knows of the absence of a legal ground at the time of the receipt, or if he subsequently learns of it, he is bound to return from the time of receipt or of acquisition of the knowledge as if an action on the claim for return were pending at the time.

(2) If the recipient, by the acceptance of an act of performance, infringes a statutory prohibition or acts contrary to public policy, he is bound in the same manner after the receipt of the performance.

§ 820. [Increased liability in case of uncertainty of production of result]

(1) If a result was intended to be produced by an act of performance, and if the production of such a result was, according to the contents of the legal transaction, regarded as doubtful, the recipient is, where the result is not produced, bound to return in the same manner as if an action were pending on the right to demand return at the time of the receipt. The same applies if the performance was made on a legal ground whose disappearance was regarded as possible according to the contents of the legal transaction, and the legal ground disappears.

(2) The recipient is bound to pay interest only from the time at which he learns that the result has not been produced, or that the legal ground has disappeared; for the return of emoluments he is not bound insofar as he is no longer enriched at that time.

§ 821. [Claim of enrichment]

A person who incurs an obligation without legal ground may refuse performance, even if the claim for release from the obligation has been barred by prescription.

§ 822. [Third party's duty to return]

If the recipient transfers the thing acquired gratuitously to a third party, and if in consequence of this the obligation of the recipient for return of the enrichment is excluded, the third party is bound to return the enrichment as if he had received it from the creditor without legal ground.'

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APPENDIX B

LIST OF CASES

- ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA)
ABSA Bank Ltd t/a Bankfin v C B Stander t/a CAW Paneelkloppers 1998 (1) SA 939 (C)
African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A)
Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A)
Amod Salie v Ragoon 1903 TS 100
APA Network Consultants (Pty) Ltd v ABSA Bank Ltd 1996 (1) SA 1159 (W)
- B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A)
Baker v Probert 1985 (3) SA 429 (A)
Banjo v Sungrown (Pty) Ltd 1969 (1) SA 401 (N)
Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A)
Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another [1979] 3 All ER 522 (QB)
Behr v Minister of Health 1961 (1) SA 629 (SR)
Bernstein v Taylor (1888) 5 HCG 258
Besselaar v Registrar, Durban and Coast Local Division, and Others 2002 (1) SA 191 (D)
B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)
Blesbok Eiendomsagentskap v Cantamessa 1991 (2) SA 712 (T)
Boland Bank Ltd v Pienaar and Another 1988 (3) SA 618 (A)
Bonitas Medical Aid Fund v Volkskas Bank Ltd and Another 1992 (2) SA 42 (W)
Botha v Van Niekerk 1983 (3) SA 513 (A)
Bousfield v The Divisional Council of Stutterheim (1902) 19 SC 64
Bouwer NO v Saambou Bank Bpk 1993 (4) SA 492 (T)
Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd 1997 (2) SA 35 (A)
Boyce NO v Bloem and Others 1960 (3) SA 855 (T)
Brink v Kitshoff NO 1996 (4) SA 197 (CC)
Buzzard Electrical (Pty) Ltd v J58 Jan Smuts Avenue Investments (Pty) Ltd and Another [1996] 3 All SA 1 (A); 1996 (4) SA 19 (A)
- Cocks v Masterman* (1829) 9 B & C 902 [1824-34] All ER Rep 431 (KB)
Colonial Government v Smith and Company (1901) 18 SC 380
Commissioner for Inland Revenue v Visser 1959 (1) SA 452 (A)
Commissioner of Customs & Excise v Bank of Lisbon International Ltd and Another 1994 (1) SA 205 (N)
Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd 1941 AD 369
Conradie v Rossouw 1919 AD 314
Crouch v Credit Foncier of England (1873) LR 8 QB 374
- De Hart v De Jongh* 1903 TS 260
Divisional Council of Aliwal North v De Wet 7 SC 232

Duke v Allen 1953 (3) SA 702 (N)
Du Preez v Boetsap Stores (Pty) Ltd 1978 (2) SA 177 (NC)

Edelstein v Edelstein NO and Others 1952 (3) SA 1 (A)
Estate Jager v Whittaker and Another 1944 AD 246
Estate Thomas v Kerr & Another (1903) 20 SC 354

Fircone Investments (Pty) Ltd v Bank of Lisbon and South Africa and Another 1982 (3) SA 700 (T)
First National Bank of SA Ltd v B & H Engineering 1993 (2) SA 41 (T)
First National Bank of Southern Africa Ltd v East Coast Design CC and Others 2000 (4) SA 137 (D)
First National Bank of SA Ltd v Lynn NO and Others 1996 (2) SA 339 (A)
First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA)
Firststrand Bank Ltd formerly First National Bank of SA Ltd v ABSA Bank Ltd 2001 (1) SA 803 (W)
Frame v Palmer 1950 (3) SA 340 (Africa Ltd 1905 TH 26)
Froman v Robertson 1971 (1) SA 115 (A)

Gammon v McClure 1925 CPD 137
George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A)
Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 563 (T)
Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C)
Grant's Farming Co Ltd v Attwell (1901) 9 HCG 91
Greenshields v Chisolm (1884) 3 SC 220

Hammond, Harvey & Newton v Union Textile Mills Ltd 1949 (3) SA 398 (E)
Hanomag SA (Pty) Ltd v Otto 1940 CPD 437
Harman's Estate v Bartholomew 1955 (2) SA 302 (N)
Hazis v Transvaal and Delagoa Bay Investment Co Ltd 1938 WLD 167
Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others 2001 (4) SA 360 (W)
Hennie Slabbert Motors (Pty) Ltd v De Lange 1966 (3) SA 45 (T)
Hill v The Colonial Banking & Trust Co 1927 TPD 138
Hippo Quarries (Tvl) (Pty) Ltd v Eardley 1992 (1) SA 867 (A)
Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968 (1) SA 571 (A)
Hodges v Coubrough NO 1991 (3) SA 58 (D)
Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 (1) SA 295 (W)

Illings (Acceptance) Co (Pty) Ltd v Ensor NO 1982 (1) SA 570 (A)
Inclledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd 1990 (4) SA 798 (A)
Info Plus v Scheelke 1998 (3) SA 184 (SCA)
Inland Property Development Corporation (Pty) Ltd v Cilliers 1973 (3) SA 245 (A)

Jajbhay v Cassim 1939 AD 537
John Bell & Co Ltd v Esselen 1954 (1) SA 147 (A)
Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A)
Jones and Druker NNO and Another v Durban City Council and Another 1964 (2) SA 354 (D)

Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A)
Kehrman v Stewart 1905 TS 677
Kelly v Solari (1841) 9 M & W 54 (152 ER 24)
King v Cohen Benjamin and Co 1953 (4) SA 641 (W)
Klug & Klug v Penkin 1932 CPD 401
Koen v Goosen 1971 (3) SA 510 (C)
Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 (3) SA 283 (A)
Kotsopoulos v Bilardi 1970 (2) SA 391 (C)
Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk 1997 (3) SA 300 (T)

Landers v Vogel (1906) 27 NLR 458
Lawrie v Union Government (Minister of Justice) 1930 TPD 402
Lewis Brothers v East London Municipality 21 SC (1904) 156
Licences and General Insurance Co v Ismay 1951 (2) SA 456 (ED)
Living Legend Motors (Pty) Ltd v De Villiers and Others (W) Case No 20279/2001
15 March 2002, unreported

Maritime Motors (Pty) Ltd v Von Steiger and Another 2001 (2) SA 584 (SE)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)
McEwen NO v Khader 1969 (4) SA 559 (N)
Mignoe Properties (Pty) Ltd v Kneebone 1989 (4) SA 1042 (A)
Milner v Union Dominions Corporation (SA) Ltd and Another 1959 (3) SA 674 (C)
Minister van Justisie v Jaffer 1995 (1) SA 273 (A)
Minister of Justice v Lawrie 1930 TPD 877
Mohamed v Kamaludien 1938 CPD 140
Muller NO v Trust Bank of Africa Ltd and Another 1981 (2) SA 117 (N)

Natal Bank Ltd v Roorda 1903 TH 298
Nedcor Bank v ABSA Bank and Another 1995 (4) SA 727 (W)
Nel v Divine Hall & Co (1890) 8 SC 16
New Club Garage v Milborrow and Son 1931 GWL 86
Nortje en 'n Ander v Pool NO 1966 (3) SA 96 (A)

Odendaal v Van Oudtshoorn 1968 (3) SA 433 (T)

Pahad v Director of Food Supplies and Distribution 1949 (3) SA (A)
Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd 1996 (1) SA 1182 (A)
Patel v Adam 1997 (2) SA 653 (A)
Phil Morkel Bpk v Niemand 1970 (3) SA 455 (C)
Phillips v Hughes, Hughes v Maphumulo 1979 (1) SA 225 (N)
Pienaar v Boland Bank and Another 1986 (4) SA 102 (O)
Preller and Others v Jordaan 1956 (1) SA 61 (A)
Pretorius v Van Zyl 1927 OPD 226
Prince qq Dieleman v Berrange, alias Anderson (1830) 1 Menz 435

Rabinowitz and Another v De Beers Consolidated Mines Ltd and Another 1958 (3) SA 619 (A)
Rane Finance (Pty) Ltd v Queenstown Municipality and Another 1988 (4) SA 193 (E)
Reliance Agencies (Pty) Ltd v Patel 1946 CPD 463

Resnik v Lekhethoa 1950 (3) SA 263 (T)
Rolfes, Nebel & Co v Zweigenhaft 1903 TS 185
Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd 1992 (2) SA 807 (A)
Rosen v Barclays National Bank Ltd 1984 (3) SA 974 (W)
Rossler v Kemsley Millbourn Acceptance Corporation (Pty) Ltd 1931 NPD 335
Rousseau and Others NNO v Visser and Another 1989 (2) SA 289 (C)
Rulten NO v Herald Industries (Pty) Ltd 1982 (3) SA 600 (D)
Ryneveld v The Wine Depot (1833) 2 Menz 185

S v Commissioner of Taxes 1984 (3) SA 584 (ZS)
S v Graham 1975 (3) SA 569 (A)
Saambou Bank Ltd v Essa 1993 (4) SA 62 (N)
Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A)
Santam Bank v Voigt 1990 (3) SA 274 (E)
Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)
Shaw v Burger 1994 (2) SA 529 (C)
Shaw v Kirby 1924 GWL 33
Spindriftier (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A)
Standard Bank of SA Ltd v ABSA Bank Ltd and Another 1995 (2) SA 740 (T)
Standard Bank of SA Ltd v Nair 2000 (1) SA 998 (D)
Standard Bank of South Africa Ltd v Haskins Case No 4688/90 11 April 1991, unreported
Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979 (2) SA 383 (C)
Standard General Insurance Co Ltd v SA Brake CC 1995 (3) SA 806 (A)
Stapelberg NO v Barclays Bank DC & O 1963 (3) SA 120 (T)
Steyn v LSA Motors Ltd 1994 (1) SA 49 (A)
Stoll's Trustee v Kriege and Bosman (1835) 3 Menz 448

Theron v Africa (1893) 10 SC 246
Thompson v Scholiz 1999 (1) SA 232 (SCA)
Trahair v Webb and Co 1924 WLD 227
Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others 1996 (4) SA 499 (A)
Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA 166 (A)
Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A)
Turkstra v Massyn 1959 (1) SA 40 (T)

Union Bank v Beyers; Union Bank v Du Toit (1884) 3 SC 89
Union Government v National Bank of SA Ltd 1921 AD 121
Uxbury Investment (Pty) Ltd v Sunbury Investments (Pty) Ltd 1963 (1) SA 747 (C)

Van Staden v Pretorius 1965 (1) SA 852 (T)
Van Zyl v Credit Corporation of SA (Ltd) 1960 (4) 582 (A)
Vereins- und Westbank AG v Veren Investments and Others 2002 (4) SA 421 (SCA)
Visser v Rousseau 1990 (1) SA 139 (A)
Volksskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander 1991 (3) SA 605 (A)

Wildrice Investments (Pty) Ltd v Commissioner for Inland Revenue 1987 (1) SA 247 (T)

Williams Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360
Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A)
Wolmaransstad Ko-operatiewe Vereeniging v Leask & Co 1915 TPD 272
Wright & Co v The Colonial Government (1891) 8 SC 260
Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 (3) SA 798 (A)

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APPENDIX C

BIBLIOGRAPHY

- Brox, H
Brox, H & Walker, W-D
Bell, J
Canaris, C-W
Allgemeines Schuldrecht 27 ed (2000)
Besonderes Schuldrecht 25 ed (2000)
Policy Arguments in Judicial Decisions (1983)
'Der Bereicherungsausgleich im Dreipersonenverhältnis' in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds) *Festschrift Karl Larenz zum 70. Geburtstag* (1973) 799
- Canaris, C-W
Carey Miller, D L
Christie, R H
Cockrell, A
'Überforderte Professoren?!' *NJW* 1992, 3134
The Acquisition and Protection of Ownership (1986)
The Law of Contract in South Africa 4 ed (2001)
'Substance and form in the South African law of contract' (1992) 109 *SALJ* 40
- Corbett, M M
'Aspects of the role of policy in the evolution of our common law' (1987) 104 *SALJ* 52
- Cowen, D V & Gering, L
The Law of Negotiable Instruments in South Africa 4 ed (1966)
- Cowen, D V
'A bank's right to recover payments made by mistake: *Price versus Neal* revisited' (1983) 16 *CILSA* 1
- Dagan, H
'In defence of the good samaritan' (1999) 97 *Michigan Law Review* 1152
- Dawson, J P
Dawson, J P
Unjust Enrichment: A Comparative Analysis (1951)
'Indirect enrichment' in E von Caemmerer, S Mentschikoff & K Zweigert (eds) *Ius Privatum Gentium: Festschrift für Max Rheinstein* vol 2 (1969) 789
- De Villiers, M
De Vos, W
'Negotium in Roman Law' (1928) 45 *SALJ* 223
'Miskenning van negotiorum gestio' (1965) 28 *THRHR* 229
- De Vos, W
'Enrichment at whose expense? A reply' (1969) 86 *SALJ* 227
- De Vos, W
Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3 ed (1987)
- De Wet, J C & Van Wyk, A
H
Die Suid-Afrikaanse Kontraktereg & Handelsreg vol 1, 5 ed (1992)
- Dickson, B
'The law of restitution in the Federal Republic of Germany: A comparison with English law' [1987] 36 *ICLQ* 751
- Du Plessis, J E
Eiselen, S & Pienaar, G
Eiselen, S
'Die Regsaard van Prestasie' (2002) 65 *THRHR* 59
Unjustified Enrichment: A Casebook 2 ed (1999)
'Fraudulent cheque payments and unjustified enrichment – confusion reigns' (2001) 118 *SALJ* 415
Schuldrecht Band II Besonderer Teil Teilband 2 8 ed (2000)
- Esser, J & Weyers, H-L
'Der Bereicherungsausgleich in

- Mehrpersonenverhältnissen' (1999) 199 *AcP* 1
(reprinted in Wolfgang Ernst (ed) *Werner Flume: Studien zur Lehre von der ungerechtfertigten Bereicherung* (2003) at 105 ff).
The German Civil Code (1975)
- Forrester, I S, Goren, S L & Ilgen, H-M
- Greeff, M & Nagel, C J 'Die tydstip van betaling en die sertifiseering van tjeks' (1992) 25 *De Jure* 56
- Hadding, Walther *Der Bereicherungsausgleich beim Vertrag zu Rechten Dritter* (1970)
- Honoré A M 'Third party enrichment' 1960 *Acta Juridica* 236
- Horn, N, Kötz, H & Leser, H G *German Private Law and Commercial Law: An Introduction* (1982) (transl by T Weir)
- Huek, A & Canaris, C-W *Recht der Wertpapiere* 11 ed (1977)
- Hutchison, D(ed) *Wille's Principles of South African Law* 8 ed (1991)
- Hutchison, D B & Van Heerden, B J 'Mistake in contract: A comedy of (justus) errors' (1987) 104 *SALJ* 522
- Hutton, S 'Restitution after breach of contract: Rethinking the conventional jurisprudence' 1997 *Acta Juridica* 201
- Jakobs, H H 'Die Rückkehr der Praxis zur Regelanwendung und der Beruf der Theorie im Recht der Leistungskondiktion' 1992 *NJW* 2524
- Joubert, C P Review of *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* by W de Vos (1959) 76 *SALJ* 471
- Joubert, D J *General Principles of the Law of Contract* (1987)
- Joubert, D J 'Verhandelbare dokumente: die verrykingsaanspraak van die betrokke bank' (1993) 9 *De Jure* 76
- Kaser, M *Das römische Privatrecht: Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht* 2 ed (1971)
- Kaser, M *Das römische Privatrecht: Zweiter Abschnitt: Die nachklassischen Entwicklungen* 2 ed (1975)
- Kaser, M *Roman Private Law* 3 ed (1980) (transl by R Dannenbring)
- Koppensteiner, H-G & Kramer, E A *Ungerechtfertigte Bereicherung* 2 ed (1988)
- Kotze, J G *Causa in the Roman and Roman-Dutch Law of Contract* (1922)
- Kropholler, J *Studienkommentar BGB* 4 ed (2000)
- Kupisch, B *Gesetzespositivismus im Bereicherungsrecht: Zur Leistungskondiktion im Drei-Personenverhältnis* (1978)
- Kupisch, B 'Rechtspositivismus im Bereicherungsrecht' 1997 *JZ* 213
- Kupisch, B 'Die Bankgarantie auf erstes Anfordern im Dickicht des modernen Bereicherungsrechts – zum ungerechtfertigten Vorteil des Garantienehmers? – Vom dogmatischen Nutzen einer wirtschaftlichen Betrachtungsweise für das Dreipersonenverhältnis' [1999] 48 *Zeitschrift für Wirtschafts- und Bankrecht* 2381

- Kupisch, B 'Der Gedanke "als ob": Zur wirtschaftlichen Betrachtungsweise bei der Anweisung, romanistisch und zivilistisch' in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds) *Rechtsgeschichte und Privatrechtsdogmatik* (2000) 431
- Larenz, K & Canaris, C-W *Lehrbuch des Schuldrechts: Zweiter Band Besonderer Teil* vol 2, 13 ed (1994)
- Loewenheim, U *Bereicherungsrecht* 2 ed (1997)
- Lieb, M § 812 ff in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* 3 ed (1997)
- Lieb, M 'Zur bereicherungsrechtlichen Rückabwicklung bei der Zession' (1990) 7 *Jura* 359
- Liebs, D 'The history of the Roman *condictio* up to Justinian' in *The Legal Mind: Essays for Tony Honoré* (1986) 163
- Lorenz, W 'Abtretung einer Forderung aus mangelhaftem Kausalverhältnis: Von wem kondiziert der Schuldner?' (1991) 191 *AcP* 279
- Lorenz, W § 812 ff in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Zweites Buch: Recht der Schuldverhältnisse* (1999)
- Lotz, J G 'Enrichment' *LAWSA* vol 9 (revised by A de W Horak), First reissue (1996)
- Lubbe, G F & Murray, C M *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3 ed (1988)
- Malan, F R, Pretorius, J T assisted by S F du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* 4 ed (2002)
- Malan, F R & Pretorius, J T 'Enrichment in triangular situations, interest and the in duplum rule, and personal liability and company names' (1996) 8 *South African Mercantile Law Journal* 399
- Markesinis, B S, Lorenz, W & Dannemann, G *The German Law of Obligations* vol 1 *The Law of Contracts and Restitution* (1997)
- Martinek, M 'Die veranlaßte Drittleistung oder "Haare in der Suppe"' 1992 *NJW* 3141
- Medicus, D *Bürgerliches Recht* 19 ed (2002)
- Medicus, D *Schuldrecht I: Allgemeiner Teil* 15 ed (2004)
- Medicus, D *Schuldrecht II: Besonderer Teil* 12 ed (2004)
- Meier, S 'Mistaken payments in three-party situations: a German view of English law' (1999) 58 *Cambridge Law Journal* 567
- Miller, S 'Unjustified enrichment and failed contracts' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 437
- Nagel, C J & Roestoff, M 'Verrykingsaanspraak van bankier na betaling van afgelaste tjeek' (1993) 56 *THRHR* 486
- Nienaber, P M Nienaber 'Cession' *LAWSA* vol 2, First Reissue (1993)

- O'Brien, P 'A generally applicable *condictio sine causa* for South African law' 2000 *TSAR* 752
- Bassenge, P, Diederichsen, U, Edenhofer, W, Heinrichs, H, Heldrich, A, Putzo, H, Sprau, H, Thomas, H (eds) *Palandt: Bürgerliches Gesetzbuch* 57 ed (1998) (various contributors)
- Pfister, B 'Zum Bereicherungsanspruch im Dreiecksverhältnis bei Fehlen einer Anweisung' 1969 *JR* 47
- Pretorius, C-J 'Mistaken payments by a bank on a countermanded or dishonoured cheque – the *condictio sine causa* and *condictio indebiti*: *Saambou Bank Ltd v Essa* 1993 4 SA 62 (N)' (1994) 57 *THRHR* 332
- Pretorius, C-J 'Payment by a bank on a countermanded cheque and the *condictio sine causa*: *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A)' (1995) 58 *THRHR* 733
- Pretorius, J T 'Aspects of the collection of a cheque cleared through an automated clearing bureau' (1998) 10 *SA Mercantile LJ* 326
- Reuter, D & Martinek, M *Ungerechtfertigte Bereicherung* (1983)
- Romain, A, MacMahon, K & Rutter, D *Dictionary of Legal and Commercial Terms: Wörterbuch der Rechts- und Wirtschaftssprache* Part 2 3 ed (1994)
- Rubin, L *Unauthorized Administration (Negotiorum Gestio) in South Africa* (1958)
- Schall, A *Leistungskondition und 'Sonstige Kondition' auf der Grundlage des einheitlichen gesetzlichen Kondiktionsprinzips* (2003).
- Schlechtriem, P *Schuldrecht Besonderer Teil* 4 ed (1995)
- Schlechtriem, P § 812 in O Jauernig (ed) *Bürgerliches Gesetzbuch* 10 ed (2000)
- Schmidt, F 'The German abstract approach to law: Comments on the system of the Bürgerliches Gesetzbuch' (1965) 9 *Scandinavian Studies in Law* 133
- Schmidt, K 'Bereicherungsausgleich bei Geschäftsunfähigkeit des Anweisenden' 1991 *JuS* 75
- Scholtens, J E 'Payment to one's creditor's creditor' (1950) 67 *SALJ* 315
- Scholtens, J E 'Negotiorum gestio and unjust enrichment' (1951) 68 *SALJ* 134
- Scholtens, J E 'Rights of recourse of sureties and third persons who paid another's debt' (1959) 76 *SALJ* 266
- Scholtens, J E 'The general enrichment action that was' (1966) 83 *SALJ* 391
- Scholtens, J E 'Enrichment at whose expense?' (1968) 85 *SALJ* 369
- Scholtens, J E 'An old question of enrichment liability: payment of another's debt' (1969) 86 *SALJ* 131
- Scholtens, J E 'The actio contraria of the negotiorum gestor and his duty to account' (1970) 87 *SALJ* 284
- Schulz, F *Principles of Roman Law* (1936)
- Schulz, F *Classical Roman Law* (1951)

- Scott, S J *The Law of Cession* (1980)
- Silke, J M *De Villiers and Macintosh: The Law of Agency in South Africa* 3 ed (1981)
- Sinclair, J D & Visser, C 'Law of negotiable instruments' 1984 *ASSAL* 377
- Sonnekus, J C 'Ongeregverdigde verryking en ongeregverdigde verarming vir kondikering in drieparty-verhoudings' 1996 *TSAR* 1
- Stassen, J C 'Driepartybetalingsmeganismes in die moderne bankreg: die regs aard van die verhouding tussen bank en kliënt' 1980 *Modern Business Law* 77
- Stassen, J C & Oelofse, A N 'Terugvordering van foutiewe wisselbetalings: geen verrykingsaanspreeklikheid sonder verryking nie' 1983 *Modern Business Law* 137
- Stassen, J C 'Countermanded cheques and enrichment – some clarity, some confusion' 1985 *Modern Business Law* 15
- Stolte, W 'Der Leistungsbegriff: Ein Gespenst des Bereicherungsrechts?' 1990 *JZ* 220
- Tager, L 'Negotiable Instruments' (revised by H Daniels) *LAWSA* vol 19 First Reissue (1996)
- Van der Merwe, C G *Sakereg* 2 ed (1989)
- Van der Merwe, S, Van Huyssteen, L F, Reinecke, M F B & Lubbe, G F *Contract: General Principles* 2 ed (2003)
- Van Heerden, B, Cockrell, A & Keightley (general eds) *Boberg's Law of Persons and the Family* 2 ed (1999)
- Van Huyssteen, L F, Van der Merwe, S & Maxwell, C J *International Encyclopaedia of Laws: South Africa* 2 ed (2003)
- Van Zyl, D H *Negotiorum Gestio in South African Law: An Historical and Comparative Analysis* (1985)
- Van Zyl, D H 'The general enrichment action is alive and well' in D P Visser (editorial consultant), T W Bennert, D J Devine, D B Hutchison, I Leeman, C M Murray & D van Zyl Smit (eds) *Unjustified Enrichment: Essays in Honour of Wouter de Vos* (1992) 115
- Van Zyl, D H 'Unauthorised payment and unjust enrichment in banking law' 1998 *TSAR* 177
- Verse, D A *Verwendungen in Eigentümer-Besitzer Verhältnisse* (1999)
- Visser, C 'The automated clearing of cheques: when is payment effected?' (1991) 21 *Businessman's Law* 3
- Visser, C 'The automated clearing of cheques: when is payment effected?' (1991) 21 *Businessman's Law* 3
- Visser, D P *Die Rol van Dwaling by die Condictio Indebiti* (unpublished thesis, 1985)
- Visser, D P 'Die grondslag van die *condictio indebiti*' (1988) 51 *THRHR* 492
- Visser, D P 'Rethinking unjustified enrichment: A perspective of the competition between contractual and enrichment remedies' 1992 *Acta Juridica* 203
- Visser, D P 'Das Recht der ungerechtfertigten Bereicherung' in R

- Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts in 17. und 18. Jahrhundert* (1992) 374
- Visser, D P 'Unjustified enrichment' 1993 *ASSAL* 229
- Visser, D P 'Unjustified enrichment' 1994 *ASSAL* 221
- Visser, D P 'The role of judicial policy in setting the limits of a general enrichment action' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 342
- Visser, D P 'Unjustified enrichment' 1995 *ASSAL* 225
- Visser, D P 'Placing the civilian influence in Scotland' in D L Carey Miller & R Zimmermann (eds) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 239
- Visser, D P 'Unjust enrichment' 2000 *ASSAL* 273
- Visser, D P 'Searches for silver bullets: Enrichment in three-party situations' in D Johnston & R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 526
- Visser, D P & Miller, S 'Between principle and policy: Indirect enrichment in subcontractor and 'garage repair' cases' (2000) 117 *SALJ* 594
- Von Caemmerer, Ernst *Gesammelte Schriften I* (1969)
- Wessels, J W *The Law of Contract in South Africa* 2 ed (1951) (edited by A A Roberts)
- Whitty, N R & Van Zyl, D H 'Unauthorized management of affairs' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 366
- Whitty, N R & Visser, D 'Unjustified enrichment' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 399
- Wieling, H J *Bereicherungsrecht* 2 ed (1999)
- Zimmermann, R 'A road through the enrichment-forest? Experiences with a general enrichment action' (1985) 18 *CILSA* 1
- Zimmermann, R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990)
- Zimmermann, R 'Unjustified enrichment: the modern civilian approach' (1995) 15 *Oxford Journal of Legal Studies* 403
- Zimmermann, R 'Savigny's Legacy: Legal history, comparative law, and the emergence of a European legal science' [1996] 112 *LQR* 576
- Zimmermann, R & Du Plessis, J 'Basic features of the German law of unjustified enrichment' [1994] *Restitution Law Review* 14
- Zweigert, K & Kötz, H *Introduction to Comparative Law* 3 ed (1998) (transl by T Weir)